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DEPARTMENT REPORTS

OF THE

STATE OF NEW YORK

CONTAINING THE

DECISIONS, OPINIONS AND RULINGS

OF THE

State Officers, Departments, Boards
and Commissions

AND

MESSAGES OF THE GOVERNOR

OFFICIAL EDITION

WILLIAM V. R. ERVING, Miscellaneous Reporter

VOLUME 15

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STATE OFFICIALS

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Corrected to date

(Address, Albany, N. Y., except where otherwise indicated)

1918

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Commissioner.....	Edward B. Long.
Commissioner.....	Henry K. Williams.
Commissioner.....	Pierre Lorillard, Jr.
Commissioner.....	Fred B. Parker.
Commissioner (<i>ex officio</i>).....	Edward Schoeneck, Lieut.-Gov.
Commissioner (<i>ex officio</i>).....	Charles S. Wilson, Commissioner of Agriculture.

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Commissioner.....	John Huston Finley, <i>ex officio</i> .
Secretary.....	Charles L. Chute.

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PROCLAMATION BY THE GOVERNOR

Relative to the Third Liberty Loan

Governor Charles S. Whitman, on the 6th day of April, 1918, issued the following proclamation to the people of the State of New York in relation to subscriptions to the Third Liberty Loan:

New York's pride is the pride of things done. Her leadership is no more due to her great wealth or her large population than to the patriotism of her citizens and the uses to which her wealth is put. In every war in which this country has engaged, she has shown a spirit of sacrifice that has made her pre-eminent among the States.

In this war New York has outdone her own history.

Over 175,000 of her citizens have gone into the fighting forces of the country.

To the Red Cross, our citizens have given over \$30,000,000.

One-third of the two previous Liberty Loans, or \$2,457,832,100, was subscribed within this State.

On the battlefields of France, the Frontier of Civilization, our men are to-day fighting that this country may endure as a great nation. They are fighting for us. On us is the sacred obligation to meet sacrifice with sacrifice.

I call on every citizen of this State to do his duty, and by subscribing to the Third Liberty Loan, prove to the men at the front that we are doing our part in the world fight against savagery.

Given under my hand and the Privy Seal of the State at the [L. s.] Capitol in the City of Albany this 6th day of April, in the year of our Lord 1918.

(Signed) CHARLES S. WHITMAN.

By the Governor:

WM. A. ORR,

Secretary to the Governor.

STATE DEPT. REPT.—Vol. 15 1

COURT OF CLAIMS

CHARLES N. BULGER, DAVID F. COSTELLO and NELSON P. BONNEY, as Trustees in Bankruptcy of the BATTLE ISLAND PAPER COMPANY, v. STATE OF NEW YORK

No. 1174-A

(Dated February 6, 1918)

Claim arising from the appropriation of lands in the town of Hannibal, Oswego county.

Title of claimants to the property in question — how acquired.

Effect of the appropriation by the State both upon the property taken and upon claimants' remaining property.

Method of arriving at the amount of damage caused by action of the State.

Interest on award — to what date figured — counterclaim of State allowed.

The lands taken by the State are part of lot No. 46 in the township of Hannibal, and lie along the Oswego river. In 1791 the State granted to Lieutenant Philip Conine two tracts or lots of land including the lands herein appropriated. This grant carried title to the center of the Oswego river. By mesne conveyances certain of the lands within the Conine patent came into the ownership of Samuel R. Beardsley and in 1901 the Battle Island Paper Company succeeded to the title of all the land, premises and rights owned by Beardsley. The interest in the bed of the Oswego river opposite and adjacent to the premises conveyed to the said company also became the property of the company.

In 1828 the State, in connection with the construction of the Oswego canal, built a wooden dam extending from the east shore of the river to Starch Factory island, and also constructed a navigable by-pass extending around Braddock's rapids and said dam, northerly through the upland on the easterly side of the Oswego river for about two miles where it again entered the river, and a guard lock near the entrance of said by-pass in the vicinity of the said dam for raising and lowering boats from one level to another. The dam under discussion was maintained until about 1867, when it was superseded by a stone dam. This latter dam extended across the river from shore to shore with bulkhead openings immediately above and adjacent to a saw mill on the westerly side of the river. One opening was 19.80 feet and the other 18.92 feet wide, and there were two openings of substantially the same dimensions in the east bulkhead of the dam.

The Battle Island Paper Company was incorporated in 1901 and in that year and the following year purchased about twenty acres of land

on the east side of and adjacent to the Oswego river in the town of Volney, Oswego county, N. Y., a short distance up the river from the location of the hydraulic power property hereinafter mentioned, for the purpose of erecting and operating thereon a large plant for the manufacture of sulphite pulp, and the property on the westerly side of the river at the location of the Battle Island dam was acquired about this time for the purpose of developing and using the water power appurtenant to such property for the operation of the proposed sulphite mill. The company actually constructed and equipped such a mill in the town of Volney and also constructed an hydraulic power plant and erected a power house at one end of said stone dam immediately below the bulkhead openings at the westerly or southerly end of said dam. The company also installed generators and other electrical equipment and appliances at the said power house and a transmission line therefrom to the sulphite mill for the purpose of manufacturing and transmitting electric power for the operation of such mill and equipped said mill with electric motors and other appliances and equipment for using such power in operating the mill. New and enlarged steel bulkheads were constructed in connection with the building of the said power house in place of those theretofore existing in the said stone dam. The State paid a portion of the cost of constructing such bulkheads.

From the time of the completion of the said mill and power plant down to the time of the appropriation on or about the 25th day of July, 1912, of the lands and premises upon which said hydraulic power plant was situated, the Battle Island Paper Company operated the said mill in the production of sulphite pulp, using the power developed at the said hydraulic power plant transmitted as aforesaid for the operation of a portion of said mill.

By such appropriation the company was permanently deprived of the use and enjoyment of the water power and water power rights appurtenant to the said property of the company on the westerly or southerly side of the Oswego river. On the 25th day of May, 1914, the company, by a decree of the District Court of the United States in and for the northern district of New York, was declared a bankrupt. The claimants, on the 10th day of July, 1914, were duly appointed trustees of the estate of the said company, thus succeeding as such trustees to all the property and assets of the company including all rights, claims, demands and causes of action against the State of New York, including the claim now before the court, as of the date of adjudication of bankruptcy. The Board of Claims of the State of New York on October 6, 1914, made an order whereby the claim theretofore filed by the company was continued in the name of the present claimants as trustees in bankruptcy.

Upon hearing and considering the claims of the respective parties and personal view of the premises in question, *held*, that the claimants had been damaged by the appropriation of their property by the State in the sum of \$149,350. This sum was arrived at by adding to the market value of the power house property the consequential damages to the transmission line and the installing of change of equipment at

the sulphite mill for Niagara power. The State has taken and appropriated the real property described upon the appropriation map and all the riparian rights appurtenant thereto of the said company, and deprived the company and the claimants of the use and enjoyment of the water power and water power rights appurtenant to the property of the Battle Island Paper Company at the westerly or southerly end of the Battle Island dam; the claimants are entitled, moreover, to the amount of depreciation resulting from the appropriation herein, in the value of the fixtures, machinery and appurtenances of the Battle Island Paper Company power plant deemed to be fairly removable and not appropriated, and to the depreciation in the value of the electric transmission line and appurtenances and equipment extending from the power plant appropriated to the said sulphite mill.

The rights from which the appropriation dispossesses the claimants set forth specifically.

In view of the facts, the history and the legislation herein shown, it must be found whether the claimant at the date of the appropriation was entitled to use anything more and had a property right to the use of any more water of the Oswego river at the point of the said dam than could pass through the two twenty-foot openings as originally constructed in the 1867 dam. The claimants clearly had no moral right to anything more.

The contentions of the claimants examined and passed upon in detail. *Held*, also, that on the award of \$149,350 interest should only be computed from February 21, 1914, the date on which claimant ceased to use the property and that as the State has a counterclaim for \$20,000 for the use and occupation of the property from July 25, 1912, the date of the appropriation, down to the 21st day of February, 1914, it is only proper that the interest on the award during this period should be offset against claimants' use of the property.

Fennell, J., concurred in the opinion of Presiding Judge Ackerson in this claim and handed down a separate opinion setting forth the reason for the conclusions reached by him regarding the respective rights of the State and the owners of water powers developed at the State dams in the Oswego river.

CLAIM against the State of New York arising from the appropriation of lands constituting part of lot 46 in the town of Hannibal, Oswego county, lying upon the Oswego river, owned by the Battle Island Paper Company, and from depriving said company of riparian rights on the said river and the Battle Island dam.

This case coming on to be heard at a regular term of this court held in the city of Syracuse on the 2d day of June, 1915, and also being heard at various regular terms of this court since that date, and the testimony being concluded on the 30th day of January,

1917, and thereafter the case having been duly submitted upon oral arguments and on the filing of printed briefs, and reply briefs, by the respective counsel, and the claimants appearing by Gannon, Spencer & Michell, Charles E. Spencer, George W. Driscoll, and the Hon. William Nottingham, of counsel, and the State appearing by Hon. Edward J. Mone and Hon. Sanford W. Smith, Deputy Attorneys-General, and after due deliberation the court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

First. On or about July 1, 1791, the State of New York executed and delivered to Lieutenant Philip Conine a patent or grant of lands, received in evidence as Exhibit 8, of which the following is a copy:

“THE PEOPLE of the State of New York, By the Grace of God, Free and Independent: To ALL to whom these Presents shall come, Greeting: Know Ye, that in pursuance of an Act of our Legislature, passed the sixth Day of April, one thousand seven hundred and ninety, entitled, ‘An Act to carry into Effect, the concurrent Resolutions and Acts of the Legislature for Granting certain lands promised to be given as bounty Lands, and for other purposes therein mentioned,’ we have Given, Granted and Confirmed, and by these presents, Do Give, Grant and Confirm unto Lieutenant Philip Conine all Those Two Certain Tracts or Lots of Land, situate, lying and being in the County of Montgomery, and known and distinguished on Maps of the Townships in which they respectively lie, (filed by our Surveyor General, in our Secretary’s Office, agreeable to Law,) as follows, to wit, by Lot Number Forty-six in the Township of Hannibal containing six hundred acres, and Lot number Eighty four in the Township of Scipio Containing six hundred acres: The said two lots together Containing one thousand two hundred acres.

“TOGETHER with all and singular the Rights, Hereditaments and Appurtenances to the same belonging or in any wise appertaining: EXCEPTING AND RESERVING to ourselves all gold and silver mines and also five acres of every hundred acres of the said tracts or lots of Land for Highways: To HAVE AND TO HOLD the above

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Court of Claims

described and granted premises unto the said Lieutenant Philip Conine, His Heirs and Assigns, as a good and indefeasible estate of inheritance forever. ON CONDITION NEVERTHELESS, that within the term of Seven Years, to be computed from the first day of January next, ensuing the date hereof, there shall be one actual settlement made on the said tracts or lots of land hereby Granted, for every six hundred acres thereof, otherwise these our Letters Patent and the estate hereby Granted, shall cease, determine and become void: IN TESTIMONY WHEREOF we have caused these our Letters to be made Patent, and the great Seal of our said State to be hereunto affixed; WITNESS our trusty and well beloved GEORGE CLINTON, Esquire, Governor of our said State, General and Commander in Chief, of all the militia, and Admiral of the navy of the same, at our City of New York, this Seventh day of July in the Year of our Lord, One Thousand seven Hundred and Ninety and in the — Year of our Independence.

“ GEO. CLINTON

“Approved by the Commissioners of the Land Office, and passed the Secretary's Office the 1st day of July 1791

“ ROBT HARPUR *D Secr'y*

“Examined and Compared with the Original by Me,

“ ROBT HARPUR *D Secr'y*

Second. The Oswego river is a fresh water, non-tidal river, entirely within the boundaries of the State of New York.

Third. The map of the township of Hannibal, referred to in said patent (Exhibit 8), shows lot 46 therein mentioned, as lying adjacent and bounded upon the Oswego river.

Fourth. The language of the grant to Lieutenant Philip Conine was apt and appropriate to carry title to the center of the Oswego river and the northeasterly boundary of the property thereby conveyed is the center of said river.

Fifth. By sundry mesne conveyances by Samuel R. Beardsley and those deriving title from him, on or about September 14, 1901, the Battle Island Paper Company succeeded to the title

to and became the owner of the lands, premises and rights conveyed to said Beardsley.

Sixth. By sundry mesne conveyances by Andalucia E. Wheeler, the only heir-at-law of Nathaniel E. Mann, and those deriving title from her, on or about September 14, 1901, the Battle Island Paper Company succeeded to the title and became the owner of a further portion of subdivision 6 of said lot 46 of the town of Hannibal, described in the conveyances thereof as follows:

"All that tract or parcel of land situate in the town of Granby, County of Oswego and State of New York and being on lot number forty-six of the original township of Hannibal bounded and described as follows: beginning at the southwest corner of land conveyed by James G. Reynolds & wife to James F. Benson; thence North 87° west five chains and thirty three links along the center of the highway; thence North 13° west four chains and fifty six links along a line parallel to the west foundation wall of the old Mann saw mill and two rods west of said wall to low water mark of the Oswego River; thence easterly along the margin of said river at low water mark to the intersection of a line parallel to and one chain east of the east wall of the said Mann saw mill; thence south 15° east two chains and twenty five links to a point four feet north of the top of the north bank of the race; thence easterly in a straight line along said bank and four feet northerly from the top thereof three chains and forty links to said Benson's west line; thence south one and one-half degrees west two chains and seven links to the place of beginning, containing two and twelve one hundredths acres more or less. Together with all the rights and privileges reserved to N. E. Mann in his deed to Samuel R. Beardsley of date March 18, 1841, and recorded in Oswego County Dec. 27, 1841 book 34 of deeds, page 502 & 503 so far as the said Andalucia E. Wheeler is heir to the same, and all rights and privileges belonging to said parcel and which the said Andalucia E. as heir at law of Nathaniel E. Mann has a right to convey."

Seventh. The interest in the bed of the Oswego river, opposite and adjacent to the premises conveyed to the Battle Island Paper

Company, as mentioned in findings five and six, which was granted to Lieutenant Philip Conine, became the property of said Battle Island Paper Company.

Eighth. On or about August 7, 1901, the Battle Island Paper Company was duly incorporated under the Business Corporations Law of the State of New York, with its principal office in Fulton, Oswego county, N. Y., for the purpose of manufacturing and selling chemical pulp and mechanical pulp and paper.

Ninth. In connection with the construction of the Oswego canal, in or about the year 1828, the State built a wooden dam to an elevation of 307.22 (Barge canal datum) extending from the east shore of the river to Starch Factory island.

Tenth. At the same time and as a part of said canal construction, the State constructed a navigable by-pass extending around Braddock's rapids and said dam, northerly through the upland on the easterly side of the Oswego river for about two miles, where it again entered the river, and a guard lock near the entrance of said by-pass in the vicinity of the aforesaid dam for raising and lowering boats from one level to another.

Eleventh. The dam constructed by the State as aforesaid from the easterly mainland to Starch Factory island was maintained from the time of its construction in or about the year 1828, to in or about the year 1867, when it was superseded by a stone dam as hereinafter set forth.

Twelfth. From the year 1820 down to about the time of the construction of the said stone dam in 1867, a saw mill existed upon the mainland immediately at the end of the aforesaid dam extending from Starch Factory island toward the southerly or westerly mainland and was operated by water wheels from water drawn from the pond above said dam, said mill continuing to be so operated down to about the time of the construction of said 1867 dam.

Thirteenth. In or about the years 1867 and 1868, pursuant to the provisions of chapter 470 of the Laws of 1865, the State of New York constructed a stone dam, known as the 1867 dam, with a masonry crest of the elevation of 307.22 feet (Barge canal datum) across the river from shore to shore, with bulkhead open-

ings immediately above and adjacent to the saw mill on the westerly side of the river. One of these openings was 19.80, and the other 18.92 feet wide, and there were two openings of substantially the same dimensions in the east bulkhead of said dam.

Fourteenth. In the years 1901 and 1902, soon after its incorporation, the Battle Island Paper Company purchased and became the owner in fee simple of about twenty acres of land on the easterly side and adjacent to the Oswego river in the town of Volney, Oswego county, N. Y., a short distance up the river from the location of the hydraulic power property herein mentioned with the plan and purpose of erecting and operating thereon a large mill and plant for the manufacture of sulphite pulp and that the property hereinbefore mentioned on the westerly side of the Oswego river at the location of the Battle island dam was acquired at or about the same time with the plan and purpose of developing and using the water power appurtenant to said property for the operation of the proposed sulphite mill.

Fifteenth. In pursuance of the aforesaid plan and purpose, during the years 1901 and 1902, the Battle Island Paper Company constructed and equipped a large sulphite mill upon the property acquired as aforesaid in the town of Volney on the easterly side of the Oswego river, with a production capacity of about fifty tons of sulphite pulp per day.

Sixteenth. In pursuance of the aforesaid plan and purpose, in the years 1901 and 1902, the Battle Island Paper Company constructed a hydraulic power plant and erected a power house at the westerly or southerly end of said stone dam of 1867, immediately below the bulkhead and openings left at the westerly or southerly end of said dam.

Seventeenth. At the time of the construction and erection of said hydraulic power plant and power house, and in pursuance of the aforesaid plan and purpose of using power derived therefrom for the operation of the sulphite mill hereinbefore mentioned, the Battle Island Paper Company installed generators and other electrical equipment and appliances at said power house and constructed a transmission line therefrom to the sulphite mill

herein mentioned with the necessary appliances and equipment for the purpose of manufacturing and transmitting electric power for the operation of such sulphite mill and equipped said mill with electric motors and other appliances and equipment for the purpose of using such power in the operation of the mill.

Eighteenth. During the year 1902, at the time of the construction of said power plant and power house, new steel bulkheads were constructed at the southerly or westerly end of the said 1867 dam in place of the bulkheads theretofore existing in said dam, with two openings, each thirty-five feet wide, for the use of the Battle Island Paper Company in the operation of its power plant; and that thereafter the Battle Island Paper Company drew water through said openings for the operation of its power plant and sulphite mill. The Battle Island Paper Company commenced work on said new bulkheads in April or May, 1902, and completed the same during said year, under a contract made and executed with the State of New York on or about June 3, 1902, introduced in evidence in this case as Exhibit "J" under which said company received from the State the sum of \$6,199.50 for or toward the construction of said bulkhead, the cost of the same in excess of the amount provided by said contract, amounting to \$3,282.75, being borne by the Battle Island Paper Company. That this work was performed under and by virtue of chapter 594 of the Laws of 1902, which contained the following language relating thereto: "Six thousand six hundred dollars, or so much thereof as may be necessary for constructing steel bulkheads at the west end of the Battle Island or Braddock's dam."

The two twenty-foot openings in the bulkhead at the easterly end of the dam were not changed.

Nineteenth. From the time of the completion of said sulphite mill and hydraulic power plant in the year 1902, down to the time of the appropriation, on or about the 25th day of July, 1912, of the lands and premises upon which said hydraulic power plant was situated, the Battle Island Paper Company operated said sulphite mill in the production of sulphite pulp using the power developed at said hydraulic power plant transmitted as aforesaid for the operation of a part of said sulphite mill.

Twentieth. For many years prior to the construction of the said 1867 dam, flash-boards of about sixteen inches in width were placed and maintained upon the crests of the dam theretofore existing and extending each way from Starch Factory island, being placed thereon in times of low water, to increase the elevation of the surface of the ponds above said dams.

Twenty-first. In constructing the said 1867 dam, the crest or coping of the dam was provided with holes in which to place pins to be used in maintaining flash-boards thereon and, subsequent to the completion of said dam, flash-boards of about sixteen inches in width were maintained thereon usually during a period of each year and that such flash-boards were maintained upon said dam during a period of each year for more than twenty years next preceding the appropriation of the property of the Battle Island Paper Company made by the State on July 25, 1912. Such flash-boards were placed upon said dam in the spring or summer when the water commenced to get low for the purpose of increasing the elevation of the surface of the pond above the dam and remained upon the dam until carried away by ice and floods in the following winter or spring.

Twenty-second. In or about the year 1904, the State of New York increased the elevation of the permanent masonry crest of the said 1867 dam to the extent of 1.28 feet to an elevation of 308.5 feet (Barge canal datum). The appropriation of moneys to elevate said masonry crest was made by chapters 599 and 600 of the Laws of 1903, which became laws one month and seven days after the Barge Canal Act became a law.

Twenty-third. Ever since the construction of the Oswego canal and the dams and structures relating thereto, during the years 1826 to 1828 until the filing and service of the appropriation map herein in 1912, the Battle Island Paper Company and its predecessors in title have been in the actual and undisputed and open possession, claiming, under and by virtue of written instruments, title, ownership and rights of possession of all of the property and premises mentioned in findings five and six hereof, including the location of the Battle Island power plant and power

house, such possession, title, ownership and right of possession, however, being subject to the right of the State to maintain the Oswego canal and the dams as constructed and maintained by the State and the rights acquired by the State in the waters of the Oswego river for the use of the Oswego canal.

Twenty-fourth. From the time of the construction of its hydraulic power plant and sulphite mill in 1902, the Battle Island Paper Company drew water through the aforesaid openings in the southerly or westerly end of said dam from the pond above the same as it was maintained by said dam and by the use of flash-boards and with the permanent addition to the masonry crest thereof, as hereinbefore set forth, down to the time of this appropriation made by the State in July, 1912, for the purpose of furnishing power for the operation of said sulphite mill.

Twenty-fifth. Under and in pursuance of chapter 147 of the Laws of 1903, the State Engineer and Surveyor, on or about July 2, 1912, for the purpose of appropriating certain lands, structures and waters of the Battle Island Paper Company, which in his judgment were necessary for the use of the improvement of the Oswego canal and for the purposes of the work and improvement authorized by said act, made a survey and map of said lands, structures and waters and annexed thereto his certificate and filed such map, and survey and certificate in his office, which map, survey and certificate were designated as contract No. 37, parcel No. 4103. That a duplicate copy of such map, survey and certificate was thereafter filed as required by law, and on or about July 25, 1912, the Superintendent of Public Works served upon the Battle Island Paper Company a notice of the filing and of the date of filing of such map, survey and certificate, a copy of which map, survey and certificate was annexed to said notice and on or about July 25, 1912, the Superintendent of Public Works caused a duplicate copy of such notice with affidavit of due service thereof on the Battle Island Paper Company to be recorded in the books used for recording deeds in the office of the county clerk of Oswego county, where the lands described were situated.

That the property thereby appropriated was described upon said map as follows:

"The right, title and interest (if any) of the Battle Island Paper Co. to all that tract or parcel of land situate, lying and being a part of Lot No. 46 of the original Town of Hannibal, now Town of Granby, County of Oswego, State of New York, and particularly described as follows: Beginning at a monumented point said point being $56^{\circ} 15' 50''$ W 949.41' from the monumented Base Line Sta. 831 + 16.31 and S. $30^{\circ} 14' 17''$ E 911.61' from the monumented offset line 180' East of the Center Line of the Improved Oswego Canal Sta. 824 + 61.29; thence N $86^{\circ} 56' 46''$ W 49.00' to a monumented point; thence S $67^{\circ} 06' 14''$ W 107.90' to a monumented point; thence S. $22^{\circ} 29' 21''$ E 28.03 to a monumented point; thence S $42^{\circ} 34' 04''$ W 265.45' to a monumented point; thence S $51^{\circ} 15' 29''$ W 135.46' to a monumented point; thence S $53^{\circ} 26' 44''$ W. 131.47' to a monumented point in the center line of the Starch Factory Road; thence along the Center Line of the Starch Factory Road S $87^{\circ} 26' 44''$ W 237.72' to a monumented point in the property line between James V. Washburn and the property herein described; thence along said property line N $21^{\circ} 15' 46''$ W 300' more or less to a point on the edge of the Oswego River; thence along the edge of the Oswego River about 169.6' to a point in the property line between James V. Washburn and the property herein described, thence along said property line S $21^{\circ} 15' 46''$ E 148.5' more or less to a monumented point; thence along the property line between James V. Washburn and the property herein described N $82^{\circ} 30' 14''$ E 224.40' to a monumented point; thence along the property line between James V. Washburn and the property herein described N $6^{\circ} 25' 16''$ W 97.6' to a monumented point; thence continuing along said property line N $6^{\circ} 25' 16''$ W 4' more or less to a point on the edge of the Oswego River; thence along the edge of the Oswego River about 430' to a point 41.34' west of the Crest Line of Battle Island Dam; thence N $2^{\circ} 44' 14''$ E 96.2 + or — parallel to and 41.34' west of said Crest Line of Battle Island Dam to a point; thence S $86^{\circ} 56' 46''$ E 61.59' to a point; thence S $2^{\circ} 44' 14''$ W 108.25' parallel to and 20.25' east of the Crest Line of Battle Island Dam to the point

of beginning and containing 2 and 504/1000 Acres of land, more or less. Being a part of the same property conveyed by the Solvay Process Co. to the Battle Island Co. September 14, 1901, and recorded in Oswego County Clerk's Office in Book 238 of Deeds, Page 534. This appropriation covers merely lands, water rights (if any), buildings and other structures; all fixtures, machinery or appurtenances which may be deemed as fairly removable remain the property of the owner and subject to his disposition."

Twenty-sixth. By said appropriation, the Battle Island Paper Company was permanently deprived of the use and enjoyment of the water power and water-power rights appurtenant to the said property of said company on the westerly or southerly side of the Oswego river.

Twenty-seventh. Upon its petition duly filed in the District Court of the United States in and for the Northern District of New York, the Battle Island Paper Company was duly adjudicated a bankrupt by a decree of said court, dated on the 25th day of May, 1914, and duly filed with the clerk thereof, and a certified copy of which was duly filed and recorded in the office of the clerk of the county of Oswego, on the 28th day of July, 1914.

Twenty-eighth. Thereafter, such proceedings were duly had in the United States District Court, in and for the Northern District of New York, that Charles N. Bulger, David F. Costello and Nelson P. Bonney were, on the 10th day of July, 1914, duly appointed trustees of the estate of said Battle Island Paper Company, bankrupt, and such appointment duly approved by an order made by said court and duly filed in the office of the clerk thereof, and a certified copy of said order was duly filed and recorded in the office of the clerk of the county of Oswego on the 25th day of July, 1914.

Twenty-ninth. Upon their appointment as trustees, as aforesaid, on the 10th day of July, 1914, said Charles N. Bulger, David F. Costello and Nelson P. Bonney duly qualified as such trustees by entering into bond to the United States in the sum required, with sureties duly approved by the court, conditioned

for the faithful performance of their official duties, which bond was duly filed in the office of the clerk of said court, and a certified copy thereof was duly filed and recorded in the office of the clerk of the county of Oswego on the 25th day of July, 1914, and that said Charles N. Bulger, David F. Costello and Nelson P. Bonney duly accepted such trust and entered upon their duties as such trustees.

Thirtieth. Upon their appointment and qualification as aforesaid, said Charles N. Bulger, David F. Costello and Nelson P. Bonney, as such trustees, succeeded to and became vested with the title to the property and assets of said Battle Island Paper Company and all rights, claims, demands and causes of action against the State of New York, including this claim, as of the date of adjudication of bankruptcy on May 25, 1914, and thereafter an order was duly made by the Board of Claims of the State of New York on the 6th day of October, 1914, whereby this claim theretofore filed by Battle Island Paper Company, claimant, against State of New York, was continued in the name of Charles N. Bulger, David F. Costello and Nelson P. Bonney, as trustees in bankruptcy of the Battle Island Paper Company and said trustees were substituted as claimants in the place and stead of the Battle Island Paper Company without prejudice to any of the proceedings already had, and said order further provided that said notice of claim might be deemed to contain appropriate allegations as to the appointment of said trustees in bankruptcy, and their substitution as claimants.

Thirty-first. The claim of the claimants herein has never been submitted to any other tribunal or officer for audit or determination, nor has said claim or any part thereof ever been assigned.

Thirty-second. The court has viewed the premises.

Thirty-third. That the natural fall or slope in the Oswego river between the upper and lower limits of lines of claimant's premises was and is not to exceed three feet.

Thirty-fourth. That the natural fall or slope of the river between the upper and lower limits of claimant's premises available for power purposes was and is not to exceed three feet.

Thirty-fifth. That the work of constructing the Oswego canal was begun on or about July 4, 1826; the canal was completed on or about December 10, 1828, and formally opened on or about April 28, 1829.

Thirty-sixth. That when the State built the 1826-1828 dam it left openings therein which enabled the owners of said Mann mill to continue to draw from the State dam water for power purposes in the aforesaid Mann mill, and after the construction of the original Oswego canal and the 1826-28 dam the Mann mill continued until some time prior to the year 1867 to take and draw water for power purposes from said dam.

Thirty-seventh. That in the year 1867 or prior thereto both of the aforesaid mills were destroyed and no waters were drawn from the State dam on the westerly side for power purposes from 1867 to 1902.

Thirty-eighth. That the so-called 1828 canal dam was built for the purpose among other things of improving and maintaining the navigability of the Oswego river for a considerable distance to the south of said dam, to wit, for over two miles to a point in the vicinity of the lower Fulton falls.

Thirty-ninth. That the 1828 canal dam backed up the water of the river for a considerable distance south of said dam, to wit, for more than two miles to a point near the lower Fulton falls, raising the water of the river above its natural elevation and flooding the upland of numerous riparian owners.

Fortieth. That the 1828 canal dam rendered available on claimant's premises a considerably greater head than was available within the limits of claimant's property prior to the building thereof.

Forty-first. That the 1828 canal dam rendered available on claimant's premises a greater head than was available or existed thereon prior to the building of said dam by the State.

Forty-second. That the 1828 canal dam and pond were maintained by the State as part and parcel of the Oswego canal continuously and without interruption from about December 10, 1828, to the year 1867 when it was superseded by a stone dam located 500 feet farther north.

Forty-third. That no use was made on claimant's premises or on the westerly side of the river of the water of the river impounded by said dam from 1867, when the new stone dam was built, until about the year 1902, following the construction by claimant of its hydro-electric power plant.

Forty-fourth. That at the time of the appropriation, to wit, July 25, 1912, there existed in the westerly bulkhead of said dam two 35-foot openings wherein were installed ten head gates with a clear opening of at least 64.85 feet, affording 1,778.2 square feet of opening for the passage of water, below elevation 308.5 (Barge canal datum).

Forty-fifth. That the result of raising the permanent crest of the 1867 dam as in the foregoing findings set forth was to raise and maintain the pool of said dam at a higher elevation than resulted from the maintenance of the 1828 and 1867 canal dams and to flow back the water on the upland of upper riparian owners beyond the limits flowed by the 1828 and 1867 canal dams.

Forty-sixth. That the State maintained flash-boards on the State canal dams only during the season when the canal was open to navigation, but said flash-boards usually remained on until taken away by ice or high water.

Forty-seventh. That flash-boards were never put on or maintained upon the State dam by or at the instance of claimant or its predecessors in title, or otherwise than by the State as an aid to navigation.

Forty-eighth. That after the date of the appropriation made by the State by map No. 4103, to wit, from July 25, 1912, to February 21, 1914, claimant continued to occupy the appropriated parcel and to make use of the water-power rights and privileges to which it claimed title, the value of which it seeks herein to recover.

Forty-ninth. Claimant has been damaged by the appropriation herein in the sum of \$149,350, which amount is arrived at as follows:

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1. Market Value of Power House Property:

(a) Reasonable market value of claimant's water-power rights.....	\$90,000
(b) Reasonable market value of power house equipment, less salvage of \$1,760.....	45,000
(c) Reasonable market value of real estate..	50

2. Consequential Damages:

(a) Transmission line.....	2,300
(b) Installing change of equipment at sulphite mill for Niagara power.....	12,000

Total damages.....	<u>\$149,350</u>
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Fiftieth. That the value of the claimant's use of the property between the date of the appropriation, July 25, 1912, and February 21, 1914, the date on which claimant ceased to use the property, is of a reasonable value substantially equal in amount to the interest on the award herein during that length of time.

CONCLUSIONS OF LAW

I. The Oswego river is non-navigable in law.

II. At the time of the granting of lot 46 of the town of Hannibal by patent to Lieutenant Philip Conine (Exhibit 8), the State of New York held the proprietary estate in such lands in fee.

III. The title to the premises designated as lot 46 of the town of Hannibal conveyed by the State to Lieutenant Philip Conine by said patent (Exhibit 8) extended to the center of the Oswego river.

IV. At the time of the appropriation herein, on July 25, 1912, the Battle Island Paper Company was the owner of premises comprising a part of said lot 46 of the town of Hannibal, as mentioned in findings of fact numbered five and six herein, adjacent and bounded upon the Oswego river, and its title thereto extended to the center of said river.

V. By the filing and service of the appropriation map and notice herein, the State has taken and appropriated the real

property described particularly upon such appropriation map, and all the riparian rights appurtenant thereto of the Battle Island Paper Company and deprived the said company and these claimants of the use and enjoyment of the water power and water-power rights appurtenant to the property of the Battle Island Paper Company at the westerly or southerly end of the Battle Island dam.

VI. The claimants are entitled to the amount of depreciation resulting from the appropriation herein, in the value of the fixtures, machinery and appurtenances of the Battle Island Paper Company power plant deemed to be fairly removable and not appropriated.

VII. The claimants are entitled to the amount of the depreciation resulting from the appropriation herein, in the value of the electric transmission line and appurtenances and equipment, extending from the power plant appropriated herein, to the Battle Island sulphite mill.

VIII. That as against the State claimants possess no right to the continuance or to the continued maintenance of the existing two thirty-five-foot openings in the west end of the State dam.

IX. That as against the State claimants possess no legal right to additional openings or greater or wider openings in the dam than were left in the dam by the State when it was constructed in 1867.

X. That as against the State claimants' rights to openings in the said dam are limited to the openings left in the 1867 dam by the State, to wit, two openings, one 19.80 and the other 18.92 feet wide.

XI. That as against the State claimants possess no right or title to the increase in the crest elevation of said dam effected in 1904 when the crest was raised 1.28 feet.

XII. That as against the State claimants' rights are limited to the use of the water of the river at the head available with the crest of the dam at 307.22 Barge canal datum.

XIII. That as against the State claimants' rights are limited to the use at the head rendered available by the 1867 dam with

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crest at 307.22 Barge canal datum of so much of one-half of the surplus water of the river as will pass through the two openings in the bulkhead of said dam, to wit, one 18.92 and the other 19.80 feet wide.

XIV. Claimants have been damaged by the appropriation herein in the sum of \$149,350, with interest thereon from February 21, 1914.

XV. That the value of the claimants' use of the property between the date of the appropriation, July 25, 1912, and February 21, 1914, the date on which claimants ceased to use the property, is equal in amount to the interest on the award herein during that length of time.

FRED M. ACKERSON,
THOS. F. FENNELL,
Judges Court of Claims.

ACKERSON, P. J.—On the 25th day of July, 1912, the State of New York appropriated for the purposes of Barge canal construction two and one-half acres of land belonging to the Battle Island Paper Company at the westerly end of the Battle Island dam across the Oswego river in the county of Oswego.

Said company purchased this property about the year 1901. It thereafter erected a power house upon the same and at the date of the appropriation this power house was furnishing electric power to the said company's sulphite mill located about a mile southerly therefrom and on the opposite side of the river, by means of a transmission line.

The said Battle Island Paper Company continued to use said property appropriated until February 1, 1914. The State has entirely destroyed the water power which the said claimant was using at the said Battle Island dam by raising the crest of the Minetto dam below Battle island so that it backs the water up to and over the crest of the Battle Island dam.

The claimant contends that it has been damaged to a very large amount by this appropriation. It contends that the title to its property extended to the center of the Oswego river and that it was in possession of very valuable water rights which have been

taken by the State. That it possessed a valuable power plant and transmission line which have become practically valueless and that its sulphite mill by reason of losing this electric power also was thereby greatly depreciated in value.

Subsequent to the appropriation by the State and the filing of the claim herein the Battle Island Paper Company was adjudicated a bankrupt, and Charles N. Bulger, David F. Costello and Nelson P. Bonney as trustees in bankruptcy for said company were duly substituted as claimants herein and authorized to prosecute said claim.

After a careful examination of the testimony in this case, and of the law applying to the facts as therein set forth, I have reached the following conclusions:

First. The patent of July 1, 1791, from the State of New York to Lieutenant Philip Conine of lot 46, which included the premises herein in question, conveyed title to the center of the Oswego river. *Varick v. Smith*, 9 Paige, 546; *Fulton L., H. & P. Co. v. State*, 62 Misc Rep. 189; 200 N. Y. 400.

Second. At the time of the appropriation herein a portion of the property vested in Lieutenant Conine by the above mentioned patent of 1791 had regularly through various mesne conveyances passed to this claimant. Such was the property appropriated by the State at the westerly end of the Battle Island dam. The claimant held the fee of that property and was vested with the ordinary rights of a riparian owner on that river which included the bed of the river and the use of the water to the center of the stream subject, however, at this point in question to such rights as the State had theretofore acquired when it constructed the old Oswego canal.

It had the right to maintain its power house at that place, and the evidence concerning the intention of the State to appropriate the land on which the power house was situated at about the time the Oswego canal was built by including such land in the triangle formed at that place by an alleged blue line as set forth on the Holmes Hutchinson map of 1834 is so indefinite, vague, uncertain, and based on so much hearsay and speculation that any presumption in favor of the State as to title based on such evidence is

entirely overcome by the long list of conveyances of said property to claimant's grantors extending over a century, none of which allude to the supposed appropriation by the State, and under which conveyances said grantors have been in continued possession and occupancy of said property without ever having their right challenged by the State. And during all of that time they have been using the water power there to a greater or less extent except from about 1867 to 1903.

Third. It is to be concluded, therefore, that claimant is the owner of said power house property; that such ownership of the land adjoining the river at that point carries with it title to the bed of the river to the center line of the river less that portion of the bed at least on which the State erected its dam.

Fourth. That such ownership by claimant and its predecessors carried with it the use of one-half of the flow of the Oswego river at that point. That claimant, therefore, was entitled, at the date of appropriation herein, to the use of one-half of the flow of the Oswego river opposite their said premises less the amount theretofore appropriated by the State for the Oswego canal.

That whatever land and water was taken by the State for the purposes of the Oswego canal at this point was evidently taken under the State's power of eminent domain, as the State now concedes in its brief herein (p. 20) and not under and by virtue of its sovereign power to improve navigation in the Oswego river. Such land and water could not be taken by the State then, therefore, nor at the present time for such a purpose without making just compensation to the riparian owner. The important question, therefore, presents itself at this point,—What amount of water was taken from claimant's predecessor in title for the old Oswego canal and what compensation was made to the owner therefor?

In determining that question it is necessary to examine the history of the State's connection with this dam and property in question.

Prior to the construction of the Oswego canal in 1828 a dam extended from Starch Factory island to claimant's premises and a saw mill was then located there.

Some time after 1841 and prior to 1867, the Reynolds saw mill was located practically where the power house is now and was run by water impounded by the dam existing there prior to the dam of 1867.

A mill race was thereafter built connecting the pool above the dam with saw mills below known as the Mann and Washburn mills. All of these mills were operated with water drawn from the dam.

There is no evidence as to the elevation of the old dam between the island and claimant's property or as to the amount of water drawn from the pool above this dam for the use of the mills above mentioned.

With conditions as aforesaid the State constructed the Oswego canal pursuant to chapter 279 of the Laws of 1824 during the years of 1826 and 1828. In so doing it built a wood crib dam with a crest elevation of 307.22 Barge canal datum from Starch Factory island to the easterly shore of the river. It probably utilized the wing dam extending from Starch Factory island to the westerly shore of the river which was probably brought to the same elevation. These dams were thereafter maintained and owned by the State. These dams constructed there by the State pursuant to law from 1826 to 1828 backed the water up the river for between two and three miles,—far south of claimant's up-stream line, and flooded the property of numerous owners up stream. Thereby the State rendered available on claimant's property a much greater head of water than claimant's predecessors theretofore enjoyed and a much greater head than was appurtenant to, or lawfully available upon that property.

That pursuant to chapter 470 of the Laws of 1865, the old dams of 1828 were replaced in 1867 by a stone dam north of the old dams adjacent to the mills of Van Buren on the east and Reynolds on the west at the same elevation as the 1828 dam, viz., 307.22 Barge canal datum. When the State constructed this dam it built two openings or bulkheads in the westerly end of the dam, one 19.80 feet and the other 18.92 feet wide.

No use was ever made of the openings in the westerly end of the dam from 1867 down to the time when the claimant bought

the property for \$8,000 and built its power house in 1902; and no use was made of the easterly end of the dam after the Van Buren mill burned in 1870.

The bulkheads at the westerly end of the dam were enlarged after claimant purchased the property. Chapter 594 of the Laws of 1902 at page 1732 appropriated \$6,600 for constructing steel bulkheads there but did not provide for enlarging the openings. Thereafter, the Superintendent of Public Works let the work of building the new bulkheads to the lowest bidder who happened to be (strange coincidence) this claimant for \$6,199.50 and a written contract was entered into June 3, 1902. Exhibit J. In that way the bulkhead openings were enlarged practically from two twenty-foot openings as originally built to two thirty-five-foot openings at an expense of over \$3,000 above the contract price for which it appears claimant has never been reimbursed, and so far as the evidence shows has never asked to be reimbursed.

By chapters 599 and 600 of the Laws of 1903 the Legislature appropriated \$11,500 for "raising and completing" this dam. Pursuant to these last mentioned statutes the permanent crest of the dam was raised by the State 1.28 feet in 1904 from 307.22 feet to 308.5 feet Barge canal datum.

It may be here noted in passing that these chapters 599 and 600 of the Laws of 1903 became laws May 14, 1903, and the Barge Canal Law providing for the canalization of the Oswego river became a law April 7, 1903. If claimant's theory of this case is correct, therefore, it would appear that immediately after the passage of the Barge Canal Act the Legislature unwittingly took steps to increase claimant's damage.

It will be readily seen therefore that the water power enjoyed by claimant on this property at the date of the appropriation was far greater than that which was naturally appurtenant to this property before the State intervened. At that time claimant's predecessor in title could only construct a wing dam to the center of the river and although such predecessor was entitled to the use of the full one-half flow of the river he could not maintain a head of water, confined as he legally must be, to his own premises, of more than two and six-tenths feet. And even if he could

have utilized the entire fall from the head to the foot of Braddock's reef he could have only secured a head of four and ninety-five one-hundredths feet.

Now upon the above facts, history, and legislation, we must find whether the claimant at the date of the appropriation was entitled to use anything more and had a property right to the use of any more water of the Oswego river at this point than could pass through the two twenty-foot openings as originally constructed in the 1867 dam.

It is clear that the claimant had no moral right to anything more. For such rights enabled it to develop far more water power at that point than was ever naturally appurtenant to that property before the State appeared on the scene. It is not strange, therefore, that the able and lucid reasoning of Judge Rodenbeck in the *Fulton, Light, Heat and Power Case*, 13 Court of Claims, 285; *affd.*, 200 N. Y. 400, also clearly demonstrates that the claimant had no legal right to anything more than the water that could be drawn through the two twenty-foot openings in the 1867 dam at a head which would be available with the crest elevation of that dam at 307.22 Barge canal datum.

It must be assumed in view of the facts of this case, and in view of the law as laid down in the case last above cited that these openings and this head were given to claimant's predecessors in title by the State in lieu of other or different compensation for what rights the State acquired there and took possession of under its right of eminent domain as being necessary for the proper construction of the Oswego canal. The rights of the parties became fixed, and in the absence of acts of the State still further invading the rights of claimant or its predecessors in the water and bed of the Oswego river, neither the claimant nor its predecessors would be or could be entitled to further benefits from the State.

It is true that officers of the State have, since the building of the 1867 dam, increased for claimant both the amount of water it could use and the head at which it could use such water. But in such increased benefits the claimant has had nothing more than what amounts to a revocable license to use; they never could

develop into property rights as against the State; and the State was at liberty at any time to withdraw such increased amount of water and head without becoming liable in damages to claimant.

It seems clear, therefore, that it is beyond all controversy as a matter of law upon the facts in this case that the only vested interest which the claimant had in water rights at the Battle Island dam and for which it must be compensated because of the appropriation by the State, was the right to draw water through the two twenty-foot openings in said dam up to the capacity of such openings, provided in so doing it did not utilize more than one-half of the surplus of the flow of the Oswego river not needed for the purposes of the old Oswego canal; and to have the crest of said dam maintained at an elevation of not less than 307.22 feet Barge canal datum.

Fifth. Having determined what openings and what crest elevation claimant was entitled to have maintained in this dam, we now come to the question of the value of the water power that could there be developed. And this value means its fair and reasonable market value as between a willing buyer and a willing seller. As bearing upon this proposition we have the evidence of experts of such market value at the date of the appropriation. We have the reasoning and figures of experts showing what amount of electrical horse power could be created by the full development of this water power. Much has been testified to as to the flow of the river and the fluctuations in flow; of the high head incident to the low flow and the low head incident to the high flow; of the days and weeks that the electrical machinery at the sulphite mill could not be operated because sufficient electrical power could not be produced to run them; of the amount of electrical energy that it would take to operate the electrical machinery in the sulphite mill by experts, some of whom could tell how many horse power it took to run a machine by simply a process of laying on of hands; and then, too, the volt meter records were produced and also the watt meter, at last, was permitted to come forth from its hiding place and offer its testimony. We are somewhat embarrassed by the fact that most of the computations by the experts were made upon the basis of the present

flow and head that claimant was permitted to use for some years immediately prior to the appropriation. But after making allowance for this different basis of calculation; after reading hundreds of pages of testimony relating to flow and head and load factor, and K. W. H. and E. H. P. and generators, and necessary E. H. P. to run the different machines in the sulphite mill, and volt meters, ammeters, and watt meters, and human meters who like Murray can measure the electric energy by simply placing his hand on the machine, we finally reach the conclusion that the reasonable market value of claimant's water-power rights with the head and water which it was entitled to use at this dam, making allowance for the temporary additional heads created by the use of flash-boards, was the sum of \$90,000.

Therefore we reach the amount of claimant's damage herein as follows:

1. Market Value of Power House Property:

(a) Water power rights.....	\$90,000 00
(b) Power house and equipment less salvage of \$1,760.....	45,000 00
(c) Real estate.....	50 08

Total	\$135,050 08
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2. Consequential Damages:

(a) Transmission line.....	2,300 00
(b) Installing change of equipment at sulphite mill for Niagara power.....	12,000 00

	\$14,300 00
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Total damages.....	\$149,350 08
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We are not unmindful of the fact that many other things have been urged upon our attention by the claimant to be considered in computing its damages. For instance, claimant produces witnesses who tell us that the value of the sulphite mill was \$600,000 before appropriation and only \$150,000 to \$325,000

(Curtis), after appropriation. This is equivalent to saying that the value of this water power to claimant was from \$275,000 to \$450,000. Consequently if its market value was only \$135,050.08 then the difference between that amount and \$275,000 for instance of \$139,949.92 should be given to the claimant as consequential damages to its sulphite mill.

But on the other hand we are confronted by evidence produced by the State that at the date of the appropriation the sulphite mill was a losing venture, that at about that time it went into bankruptcy, that it never manufactured a ton of pulp at a profit, that it was worth just as much after the appropriation as before, and that this power in question was so fluctuating that it never could be used at a profit in such a mill and was in every way unsuitable for a sulphite pulp mill.

Again, the claimant contends that this power plant furnished it about 500 electrical horse power which was necessary to run the electrical machinery at said sulphite mill; that this power must now be supplied by substitute power of some kind; that the only such power now available is Niagara power, which would cost claimant at least about \$42.50 per horse power per annum, or an annual outlay of about \$21,500. That claimant is, therefore, entitled to the value of its physical properties at the power house, including the power house, the machinery in the power house, the real estate connected with it, the transmission line, the cost of installing a change of equipment at the sulphite mill, and such sum in addition as when put at interest at five per cent would yield an annual income of \$21,500. On that basis the claimant's damages would be computed as follows:

Power house and equipment less salvage on machinery	\$45,000
Real estate.....	50
Transmission line.....	2,300
Cost of installing change of equipment at sulphite mill	12,000
A sum which put at interest would yield an annual income of \$21,500.....	430,000
Total	<u>\$489,350</u>

or at least if that figure is too high the computation of claimant's damages should be made as follows:

Real estate, transmission line, and power house and equipment less salvage	\$47,350
This amount deducted from \$430,000 leaves.....	382,650
This sum of \$382,650 added to the cost of installing new equipment at the sulphite mill of \$12,000 makes a sum of	394,650

which is the least sum that could be given to claimant which would cover the damage caused to it by this appropriation.

But the objection to this method of computing claimant's damages seems to be as follows:

The power taken by the State was fluctuating and uncertain. This instability was owing to the fact that it was developed by water power of a low and fluctuating head. Electrical energy could be developed by such a water power only at great expense and then at best it would be comparatively small in volume and uncertain in its constancy. That between such a power and the Niagara power for the purposes of a sulphite mill there could be no comparison because of the greater value of the Niagara power. That while the Niagara power would cost more, therefore, than the same amount of power from the power house in question, yet it was an entirely different power and had a great deal higher value for any purpose.

Again, while claimant alleges that it was using from 497 to 515 electric horse power at its sulphite mill it is clearly established by the evidence, I think, that it was using much less than that. Probably not over 300 to 350 electric horse power and much of the time less than that.

The volt meter record discloses that from June, 1907, to March, 1908, the daily average load for that period was 156 electric horse power.

The graphic meter record connected with the watt meter tells us that such daily average from October, 1912, to October, 1913, was 210.3 electric horse power. And during this latter period

the mill was turning out 45.2 tons of pulp per day, which was just about its maximum capacity.

It is difficult to understand how after these volt meter and watt meter records had been kept for years, presumably believed during all that time to be honest records of the output of power at this power house, that as soon as the same was appropriated by the State, or soon thereafter, they both should be discarded as being totally unreliable and absolutely of no value in determining the true amount of electrical energy actually developed by this water power. And they were discarded so effectually that but a very small portion of such records was ever resurrected notwithstanding the faithful search for the same which divers witnesses confessed they had made. It is evidently very possible if not probable, therefore, that the claimant never used at its sulphite mill on an average per day of more than 250 electric horse power.

If claimant's figures are correct and just then the State would be compelled to pay a fabulous sum for this little water power. But if such figures are correct and just, then the State should pay it, fabulous or not. But when the claimant states in its verified claim herein that it is damaged in the sum of \$1,875,500 because the State has taken a water power from it for which it paid \$8,000 eleven years previously, our curiosity is aroused at the cause of this wonderful growth in value.

And this curiosity still remains with us, notwithstanding that after the witnesses have been sworn, and the exhibits all filed, and the property inspected, the claimant while not so emphatic about the great growth in value here still insists that it must have \$700,000.

Verily, this is a growth, in comparison with which the bean stalk of the Jack and the Beanstalk tale of our childhood days pales into insignificance. A growth which reminds us of that passage of Scripture found in the sixth verse of the fourth chapter of Jonah, where we read: "And the Lord God prepared a gourd and made it to come up to cover Jonah, that it might be a shadow over his head, to deliver him from his evil case. So Jonah was exceeding glad because of the gourd."

The trouble I think is that the claimant is trying to get two values for its water power. Its experts compute the amount of electric horse power that can be developed at the power plant and tell us that has a yearly market value per horse power which amounts to a sum equal to the annual interest at 5 per cent on from \$400,000 to \$500,000. This is the capitalized value. They then proceed to tell us that the value of the sulphite mill with the said water power is \$600,000 and without it from \$150,000 to \$325,000. They claim that the difference in the value of the sulphite mill before and after the appropriation is from \$275,000 to \$450,000, which represents the consequential damages to the sulphite mill by reason of the appropriation. But it is not consequential damages to the sulphite mill at all, but simply another way of estimating the value of the water power.

In estimating the value of this water power, we first endeavor to determine what it has been able to furnish the sulphite mill in the way of electrical energy and from the testimony of experts how many electric horse power it is able to produce. Then the question arises what is that worth? What is its value to this sulphite mill? What is its value to a ground-wood mill? What is its value to a generating station for the purpose of furnishing electrical energy to a distributing company for lighting and power purposes? What is the market value of a water power of such a flow and head? When all these things are taken into consideration, we are able to draw from them all together with still other considerations perhaps the market value of this water power.

If we should use the claimant's method of reasoning we might figure like this:

A water power which can develop 500 electric horse power for the purpose of furnishing that amount of electrical energy to a distributing company is worth	\$100,000
To a sulphite mill.....	200,000
To a ground-wood mill.....	75,000

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Therefore, according to claimant's way of figuring, the water power has a value of \$375,000, whereas in order to get one true value of the water power instead of three combined values, we divide the \$375,000 by three and have \$125,000 representing the true value of the water power by taking an average of its value for different purposes.

So in this case, the average value claimant places on this water power at the power house, excluding in the cost of the power house and proposed extension is about	\$400,000
The average value placed on the same power at the sulphite mill is	362,500
	<hr/>
These added together give us.....	\$762,500
	<hr/>
Which divided by two gives us.....	\$381,250
	<hr/> <hr/>

The average of these two values which would be all that claimant would be entitled to, on its own figures, for the water power alone. Then of course should be added to that the value of claimant's physical properties and the cost of installing new equipment at the sulphite mill. With those additions to the sum above mentioned for the water power we would arrive at the correct amount of the award herein on the claimant's own showing.

But we consider the claimant's valuation too high and far above any reasonable market value. This resulting difference between the court's final determination in this case and the claimant's demand for damages is accounted for in no small part because of the claimant proceeding upon an erroneous theory as to its rights as against the State in the matter of the quantity of water and the head it was entitled to at the Battle Island dam.

And so we conclude as before stated that the fair and reasonable market value of the property appropriated herein on July 25, 1912, was..... \$135,050

That the consequential damages to which the claimant is reasonably, fairly and justly entitled are:

For transmission line.....	\$2,300
For installing change of equipment at sulphite mill	12,000
<hr/>	
Total damages	\$149,350
<hr/>	

Interest on this award should only be computed from February 21, 1914, the date on which the claimant ceased to use the property. The State has a counterclaim against the claimant for \$20,000 for the use and occupation of the property from July 25, 1912, the date of the appropriation, down to February 21, 1914. There is no dispute about claimant's use and occupation during this time. It is only proper, therefore, that the interest on the award during this period should be offset against claimant's use of the property, as we consider they are fairly equivalent. *Matter City of N. Y.*, 40 App. Div. 281; *Matter City of N. Y.*, 59 id. 603.

FENNELL, J.—To reach some fundamental bases in these Oswego water power claims it is necessary to go back to the very beginning of these water powers and the beginning of the Oswego canal and see how they became bound up with each other, and what respective rights against each other became then established.

About 100 years ago, and some years before any canal work was done, the State had a general survey made of the Oswego river and its shores to ascertain their usability for canal purposes. This disclosed, among other things, many rifts or rapids of various lengths, and usually, on the head of each, a wing dam. These wing dams were constructed of cribbing and ran from the shore line, at the head of the rapids, out into the stream and slanted diagonally upstream. The mill or power plant was erected at the shore end or, in some instances a power canal, called a headrace or flume, was carried along the shore toward the foot of the rapids, and the water there spilled back into the river,

thus getting an additional head about equal to the slope in the river between the end of the dam and the place where the waters were returned to the stream.

It is necessary to keep in mind the individual water power rights of the riparian owner, just before the State interfered with them, and to what extent those rights might have been developed, in the absence of such State interference.

In this claim, the power owner's dam extended, in a slanting direction, from a small island near the westerly shore downstream to the westerly shore, and the original mill was located at the shore end of the dam.

Into this situation we will assume the State entered with its canal plans.

What were the State's necessities? *First*, dams to make slack water navigation levels from the head of one rapids to the foot of the next rapids upstream. *Second*, lift locks to get boats from one river level to the next. *Third*, water to feed the canal and locks around each such dam and rapids or other non-navigable portion of the stream. The first required dams from shore to shore with gates to control the levels of the river. The second required a canal around the end of each dam and alongside of each rapid and falls or other obstruction to navigation, and extending from the upper end of each navigable slack water pool to the lower end of the next pool above. Sometimes, a shore canal and a single lift lock was sufficient. Again, a long rapids or non-navigable stretch would require a much longer canal and more than one lift lock. The third required that sufficient water be drawn from the river to supply the canals around each dam and rapids with the amount of water necessary to keep such canals full, to provide for lockage of boats, leakage through gates and seepage through the banks of the canal. It will be observed here that practically no water, other than that which escaped through seepage, was taken from the Oswego river by these "bypass" canals. It was all returned to the river and the river's flow was not appreciably affected by the use of diverted water for the canal. It is true each power owner's flow would be reduced

at his particular dam or rapids by the amount of water actually deflected around such dam or rapids. Such an amount of water would affect the power owner only during the six months' navigation season. During the navigation season, this withdrawal of water to lock boats around the dams and rapids would not materially affect the power owner unless he was using or could use his full one-half of the flow of the stream.

The State had authority, in the exercise of its power of eminent domain, to take the power owner's dam and dam site and erect a dam from shore to shore, paying him a just compensation for the value of his riparian rights at that time. The questions of the necessity of taking and the amount of rights to be taken were for the sovereign State to determine through that branch clothed with the exercise of such volition, and are not reviewable except for actual fraud or such lack of necessity as to amount to constructive fraud.

The holding in the case of *Varick v. Smith* may well be discussed at this point. The vital facts out of which that case grew were as follows: The water was actually taken from the river and then returned to the river a long distance downstream. The taking was done through a combination navigation and power canal. The State attempted to lease water flowing on the west side of the river to the power canal proprietor on the east side under the theory that all the surplus waters belonged to the State to use as it saw fit, and, therefore, gave it the right to lease the same. The holding was, among other things, that the moment the waters passed over the crest of the State dam they were physically and legally beyond use and, therefore, beyond appropriation by the State. That all State purposes had been accomplished by using the water to maintain the elevation and supply navigation needs, and the rest must be permitted to run down the natural channel of the river on its way to the sea. By the lease to the power owner on the east side, of the surplus waters flowing on the west side of the river, the State attempted to divert such waters and prevent entirely their flowing downstream along the lands of the west side owner. There is nothing in this holding

inconsistent with the State's using or leasing such surplus water on its dam provided the water was discharged from the wheels or the dam immediately into the river below the dam and did not interfere with the riparian rights of any lower owner.

What were the future power possibilities on these wing dam properties? The owner could join with his neighbor across the river in erecting a dam from shore to shore, making proper provision for navigation needs. He could not raise his dam one inch. He had no right of eminent domain to flood back the water on the next upstream owner. He could not regulate the flow to the harm of either his upstream or downstream neighbors. He had the riparian rights to the river in a state of nature, and no more. And he could get no more except through grant from or contract with the State, or purchase from other owners.

The State determined to build its dams on or near the sites of power dams, and to tear out the latter. This was not always the case, however. It will be remembered that these original dams were wing dams which slanted considerable distances upstream, while the State dams were erected from shore to shore.

It seems clear that the power dam owner, in the absence of a contract or agreement, could get no greater right in the State dam than he had in his own dam. However, we find him using the full head created by the canal improvement and using up to the full capacity of certain openings or headgates constructed in the dam, in so far as navigation requirements permitted.

In those days—1826 and theretofore—the development of water power was limited to the water wheels that could be directly connected by shafting to sawing, grinding or other manufacturing machinery. This very limitation of running power water through water wheels which had to be directly connected to the manufacturing machinery made rather narrow headraces or flumes desirable. Mills on the wing dams were so equipped.

It seems perfectly evident that an agreement was arrived at between the power owner and the State. He could have stood upon his constitutional right of compensation for property taken, or he could have elected to keep his mill property and to accept

the use of a State dam built and maintained by the State, with additional head created solely by the State at its own cost, and the use of a regulated stream with suitable headgates leading directly into his headrace. The power owner made his election. Instead of demanding and receiving, through the proper tribunal, a sum of money in compensation for his riparian rights to construct and maintain a dam at his own expense at the head developable on his own property, he elected to accept in lieu thereof an increased head, a limited flow and a regulated stream.

The State could not appropriate the lands of upstream owners for flowage purposes and give the power thus created to other individuals—nor could it erect, at public expense, permanent structures, such as dams, on its own property, and give away power there developable (and as soon as the dams were started, the land under them was physically appropriated, which was the actual method of appropriation used in those times). But the State could, and it appears perfectly clear that it did, give the power dam owners the additional heads and the use of State dams as a valuable consideration and in full compensation for such rights of the power owner as the State actually took away from him at that time. It must be distinctly understood at this point that the State did not take away any power rights related to any State dam or arising out of any condition related to or connected with any State improvement. The State only took or interfered with such rights as the power owners had before any State work or any State improvement was undertaken.

Judge Rodenbeck, formerly of this court, held that such an agreement was made, and, in the absence of writings, could be deduced from the acts of the owners and the State, and the status accepted by both sides for all these years must be regarded as measuring their respective rights. *Fulton Light, Heat & Power Co. v. State*, 65 Misc. Rep. 263, 289.

It may be well to quote and analyze, in connection with the actual physical structures pertaining to a State dam, the language in *Varick v. Smith*, 9 Paige, 547, 560: "What then, under the provisions of this act, in the case under consideration, was taken

and appropriated to the public use? Clearly all the land and water which were necessary for the improvement which the commissioners were then prosecuting. In other words, they took all the land and water necessary for the furnishing of an adequate supply of water for the Oswego canal. Was the water accumulated in that dam, from the moment it passed over the top of the dam and in its descent to the bed of the stream below the dam, necessary for the supply of the Oswego canal? On the contrary, the moment it commenced its descent it was incapable of being appropriated to that purpose, and it had ceased to be consecrated to the public use. It had become physically impossible to appropriate it to such use. The public property in it had ceased to exist; and in my judgment, the right of the riparian owner, which had been suspended, revived and reattached to it in full force, subject to no restriction, except that servitude to public interest, for the general purposes of navigation, which existed before the erection of the dam. It was necessary, for the purpose of diverting a portion of the waters of the Oswego river to the Oswego canal, to raise a large accumulation of water in the dam, and much more than could be diverted for the use of the canal. And as this dam was erected by the State, it became public property, so that no person possessed the right of drawing off any portion of the accumulated water, through the dam itself, by inserting a flume and gate in it; for that would involve a trespass upon the property of the State. This consideration, however, does not affect the right of the riparian owner to the water after its escape over the dam. That depends solely on the right of the State to appropriate the property of a citizen to any other purpose than public use. That is a right which does not exist, and cannot lawfully be enforced either with or without a provision for compensation. The government has the power, under the Constitution, to appropriate the private property of its citizens just so far and no further than is necessary for the purpose and object of the appropriation; and that may be an absolute and exclusive right to land or water, or it may be a partial or common or usufructuary right, according to the nature of the property and the circumstances of the case. But

when such purpose is accomplished, the right of the State is exhausted, and the whole of the residue of the property, whatever it may be, belongs to the citizen. In this particular case, the State has the absolute and exclusive right to the land on which the dam is built, and to the dam itself. It has also an absolute and exclusive right to so much water as is necessary to be diverted for the supply of the Oswego canal, and by necessary consequence it has a temporary and usufructuary right to all the water in the dam, as a means of keeping an adequate supply for actual diversion. And it has a partial right to the land on which the water flows; that is, a right to have the water fall upon it. The State, therefore, may lawfully appropriate the property of the individual owner to this extent, by making proper provision for compensation for the damages sustained. Beyond this, I apprehend the power of the government does not extend; and all right to the property, or to the use of it, which is not thus appropriated, may be enjoyed by the original owner of it or by his grantees."

First, let us take the portion stating that the water "accumulated in that dam, from the moment it passed over the top of the dam in its descent to the bed of the stream below the dam * * * ceased to be consecrated to the public use. It had become physically impossible to appropriate it to such use. The public property in it had ceased to exist; and in my judgment, the right of the riparian owner, which had been suspended, revived and reattached to it in full force, * * *."

This is readily susceptible of the meaning that the riparian owner is legally entitled to the use of the water flowing past his land from the moment the State lost physical control of same and that, as the water actually spilled over the crest of the dam onto the riparian owner's land and as the State had lost control at the same moment of spilling, the riparian owner's rights revived at that moment. Therefore, the riparian owner became reinvested with the right to use that surplus flow over the crest at the elevation of the crest from which point the water started to descend. This meaning seems to have been rather broadly accepted.

A careful examination of the actual physical conditions relating

to such State dams will show the error of drawing such a conclusion. The above quotation contains this language: "And by necessary consequence it [the State] has a temporary and usufructuary right to all the water in the dam, as a means of keeping an adequate supply for actual diversion." The following language will also be noted in the above excerpt: "It was necessary, for the purpose of diverting a portion of the waters of the Oswego river to the Oswego canal, to raise a large accumulation of water in the dam, and much more than could be diverted for the use of the canal." It seems very clear that the State dams served the two necessary public purposes of diverting some water for canal use and of maintaining navigation slack water levels in the river above such dams. There can be little or no doubt that a very small proportion of the large amount of water impounded by these State dams was actually diverted through canals except where such canals were hydraulic as well as navigation canals. It is also self-evident that to control the navigation levels above State dams, the State must have absolute and entire control of such elevations. This control could only be exercised by means of movable crests and control discharge gates. The movable crests were obtained by using flashboards, and the discharge gates installed in these dams served the double purpose of discharge for the level and headgate for the power owner. As a physical fact, it was absolutely necessary that the State have discharge gates of sufficient capacity to control the navigation levels of the river. A river flood in navigation season by passing in its entirety over the crests of the dams, might make such increased levels as to seriously interfere with, if not entirely cut off, navigation by means of the by-pass canals. Such a flood, in the absence of dam discharge gates, in the non-navigation season, by raising the flood level of the stream, would force it out of its banks and cause great damage for which the State would be liable. To avoid this very condition the present Barge canal has large Taintor gates in many of the dams. These gates are constructed in the form of segments of circles with the arc upstream and the lower edge of the arc resting on a sill on the river bottom.

The discharge capacity is increased by raising the whole arc off the bottom of the river and thus discharging the water at the foot of the dam. While these Taintor gates were not in use in the Oswego canal dams they are cited to show the physical necessity of free discharge downstream to the bottom of the river. The necessity is no different now than it always was, but the present larger levels and higher heads require a later and larger type of gate. But the law is based on the necessity and not the type of gate.

The control of the navigation levels always has been and still is one of the absolute essentials for the proper operation of the Oswego canal and the same is now true of the Barge canal. This control is absolutely necessary and as the control cannot be exercised without such discharge gates, therefore, such gates were, from the first canal down to and including the Barge canal, essential to level control and, therefore, essential for navigation purposes. These discharge gates, even though in full control of the State authorities as they always have been and always must be, would be absolutely useless unless there was a free discharge through the dam, and from its downstream face into the original bed of the river. This opportunity for discharge must be full, free and clear down to the elevation of the bottom of the discharge gates, and the bottom of which discharge gates must, of necessity, be substantially at the same elevation as the bed of the river at the downstream face of the dam. Therefore, it seems very clear that the language used by Vice-Chancellor Gridley, above quoted, could not mean that the riparian owner next below the dam could have any rights in the water which would interfere with the State's control by removable crests, gates or otherwise, but that, on the contrary, he meant that when once the State had actually discharged the water either over the crest or through the gate or in any other manner from the dam, thus actually and physically letting go of it for State purposes, it could not assert any further rights as against any riparian owner, and, because it could not assert any further rights, it could not actually take such water from above or near its dam and divert it around and away from the property of the next riparian owner. His language, with

respect to the riparian owner's rights reviving at the moment the water started its descent from the dam, must be taken in connection with the determination arrived at by him that waters could not be taken out of the channel of the river but must be permitted to flow in the course of nature, and cannot be construed in such a manner as to have it appear that the vice-chancellor held that the riparian owner below the lower face of the State dam had any riparian rights in any head of water above the elevation of the bottom of the discharge gates of such dam, except such water as he was permitted to take through State dam discharge gates which served that purpose as well as his headrace gates.

The other construction of the vice-chancellor's words would permit the use by the next lower riparian owner of the flow at a head just below the crest of the State dam "the moment it commenced its descent." To use this flow and head would require a dam to back up the water to such head. But such a dam would immediately take away the State's control of its navigation level. The full and free discharge from the State's dam would be lost, and of course, with it, the level control.

It must be held, therefore, that in cases where the State has actually appropriated the situs of a power dam, destroyed the owner's dam, and erected its own in place thereof, the State has taken all water elevation rights of that owner above the foot of the downstream face of such dam, and no structure erected by the owner so backing up water against the State dam is thereafter lawful. The riparian owner's power possibilities that attach to the water leaving the State dam are those creatable from the foot of the dam to the downstream end of the owner's uplands fronting on the river.

The power owner took his rights in the new dam by agreement, —which agreement is evidenced by the existing status thereafter. The power owner's rights became fixed as of that time, and have not and cannot grow with the advance of the science of water power development, except as such development can be applied to the limited flow permitted by the openings through the State dam into his headrace, and the head maintained by the dam. The

power owner's rights, as against the State, can never be greater than they were under the status maintained for so many years. The power owners accepted certain openings, heads, regulations of elevations, State construction and State maintenance of dam, etc., in payment for their rights interfered with. Thereafter, their rights were contractual rather than riparian, and they cannot grow and expand with the science of hydraulic development except as above stated.

The following excerpt from the opinion in the Fulton Light, Heat & Power Company case, above mentioned, indicates that Judge Rodenbeck held similar views in that case: "Just as the rights of the State became fixed by the appropriations of 1826 and 1857, so also did those of claimants; and, as the State cannot acquire more land or water for the enlarged canal without making compensation, so the claimants cannot secure water in addition to that which can find its way upon their property through the openings existing at the time of the appropriations; for the same statutes that control the rights of the State also fix those of the claimants. Claimants' predecessors were compensated for the water rights which they lost when the wing dam was destroyed by the State by the appropriations made for the old canal which allowed them to draw water from the river under the increased head provided by the new dam. Without this provision they would not have been in a position as of right to claim the benefit of any increased head created by the erection of a dam higher than the original wing dam. Any power thus created belonged to the State, and they were not at liberty to draw upon this power without making a return to the State."

Having reached the conclusion that the respective rights of the power owner and the State became fixed, it might be well to discuss the constitutional right of the State to take, in the inception of the Oswego canal project, such dams and water powers, and lease the surplus waters thus created. The taking was by the sovereign, done through those duly constituted and empowered. The purpose and amount of taking are not reviewable except for reasons heretofore mentioned. In this connection may be quoted the language of Justice Brown of the United States

Supreme Court, in the case of Kaukauna Water Power Company v. Green Bay & Mississippi Canal Company, 142 U. S. 254, 275: "The true distinction seems to be between cases where the dam is erected for the express or apparent purpose of obtaining a water power to lease to private individuals, or where in building a dam for a public improvement, a wholly unnecessary excess of water is created, and cases where the surplus is a mere incident to the public improvement and a reasonable provision for securing an adequate supply of water at all times for such improvement. No claim is made in this case that the water power was created for the purpose of selling or leasing it, or that the dam was erected to a greater height than was reasonably necessary to create a depth of water sufficient for the purposes of navigation at all seasons of the year. So long as the dam was erected for the *bona fide* purpose of furnishing an adequate supply of water for the canal and was not a colorable device for creating a water power, the agents of the State are entitled to great latitude of discretion in regard to the height of the dam and the head of water to be created; and while the surplus in this case may be unnecessarily large, there does not seem to have been any bad faith or abuse of discretion on the part of those charged with the construction of the improvement. Courts should not scan too jealously their conduct in this connection if there be no reason to doubt that they were animated solely by a desire to promote the public interests, nor can they undertake to measure with nicety the exact amount of water required for the purposes of the public improvement. Under the circumstances of this case, we think it within the power of the State to retain within its immediate control such surplus as might incidentally be created by the erection of the dam."

That the Oswego canal and its structures were public improvements is shown by the fact that the great arteries of commerce which advanced New York State to commercial leadership were its canals, of which these dams were necessary integral parts.

Conceding the State's right to take water was established — how much did the State take? First, we must eliminate all the State works created over and above what was already there. The

State could not take from the power owner that which the power owner never had and never could create. Thus, limiting the taking to all that was necessary — the State took the power owners' wing dam by destroying it—took the land under the State dam by erecting the same—took full control of all the waters of the river from the upper navigation end of each pool created by a dam, to and including the foot of the downstream face of such dam, together with a right of free discharge therefrom—took the permanent right to flood the lands of all owners above the dam, which were actually flooded by the increased elevation of the water above its natural level. The State built its dam according to its own plans, at its own cost, at the location selected by it, determined the crest elevation, and installed gates to control the navigation level of the pool above, and paid for all flowage rights and flooding rights upstream caused by this new and higher water level above the dam. By actual physical appropriation it took complete control of and had exclusive rights to the flow of the river to the downstream face and foot of the State dam, including a free discharge. Beyond that point, under the *Varick v. Smith* case, it lost all rights to the flow or use of the water of the stream it had up to that point. But up to the time the water passed away from the State dam, the State had full control thereof except as it conveyed away certain rights therein in consideration of and as compensation for the taking of the power owner's rights in the river in its natural state as developed by his then plant, dam and other power accessories. The control and usability of such surplus of water passing over or through the dam, with its power possibilities when used under the head created by the State dam, are set forth by Justice Brown in the aforementioned case (*Kaukauna Water Power Co., etc.*, 142 U. S. 272): "No question is made of the power of the State to construct or authorize the construction of this improvement, and to devote to it the proceeds of the land grant of the United States. The improvement of the navigation of a river is a public purpose, and the sequestration or appropriation of land or other property, therefore, for such purpose, is doubtless a proper exercise of the

authority of the State under its power of eminent domain. Upon the other hand, it is probably true that it is beyond the competency of the State to appropriate to itself the property of individuals for the sole purpose of creating a water power to be leased for manufacturing purposes. This would be a case of taking the property of one man for the benefit of another, which is not a constitutional exercise of the right of eminent domain. But if, in the erection of a public dam for a recognized public purpose, there is necessarily produced a surplus of water, which may properly be used for manufacturing purposes, there is no sound reason why the State may not retain to itself the power of controlling or disposing of such water as an incident of its right to make such improvement. Indeed, it might become very necessary to retain the disposition of it in its own hands, in order to preserve at all times a sufficient supply for the purposes of navigation. If the riparian owners were allowed to tap the pond at different places, and draw off the water for their own use, serious consequences might arise, not only in connection with the public demand for the purposes of navigation, but between the riparian owners themselves as to the proper proportion each was entitled to draw — controversies which could only be avoided by the State reserving to itself the immediate supervision of the entire supply. As there is no need of the surplus running to waste, there was nothing objectionable in permitting the State to let out the use of it to private parties, and thus reimburse itself for the expenses of the improvement."

Again quoting from the same opinion at page 281: "The dam was built for a public purpose, and the act provided that if, in its construction, any water power was incidentally created, it should belong to the State, and might be sold or leased, in order that the proceeds of such sale or lease might assist in defraying the expenses of the improvement. A ruling which would allow a single riparian owner upon the pond created by this dam to take to himself one-half of the surplus water without having contributed anything towards the creation of such surplus or to the public improvement, would savor strongly of an appropriation of

public property for private use. If any such water power were incidentally created by the erection of a dam, it was obviously intended that it should belong to the public and be used for their benefit, and not for the emolument of a private riparian proprietor."

This doctrine, laid down by the United States Supreme Court, taken in connection with the holding in the case of *Varick v. Smith*, that the water must not be taken from the river immediately below the dam, but be allowed to flow thereon and thereover, would authorize the State either to erect its own power plant on the dam or rent the surplus to some power owner whose plant was conveniently located. The objection that the State, only owning the dam, does not have sufficient bank or other place on which to erect a power plant and thus, although having the legal right to use the surplus, has no legal title to any place upon which to develop it, is unsound. The sovereign State is not so devoid of the attributes of sovereignty that it cannot reach and utilize any valuable power that it creates at its expense and owns. Surely, if private property may be taken, upon just compensation, for a public work to improve navigation, which is merely to improve the opportunity for transportation as a public convenience, it certainly may exercise the same right to reach and utilize valuable water rights which are the actual property of the State. To say that the State may condemn to facilitate the handling of the commerce of the people, but cannot condemn to reach and use the property of the people, is to state that it has such power to promote public convenience, but not to reach and use public property.

The State may, for purposes of better and more convenient control of level, determine to use a fixed crest instead of flash-boards. This does not alter the respective rights of the claimant and the State, provided the claimant is permitted to take the full flow of his openings as fixed by the 1867 dam at the head then established (which we regard as including flash-boards when and as used by the State), but not drawn so as to interfere with the navigation levels.

It must be considered as understood by the power owners and

the State authorities when the original State dams were erected that flash-boards would be used when needed by the State and, when so used, the additional head thus created might be used by the power owner. This did not give the power owner any vested right in such an additional head, but merely the use thereof when and while such flash-boards were in use. The substitution of a fixed stone crest for flash-boards did not give the power owner any greater legal rights in the dam than he had before. But the right to the water was given in contemplation of the use of flash-boards when needed by the State. So this right "ran with the dam" not as a vested right which the State must take and pay for, as such, under the power of eminent domain, but pay for merely as such permissive user might affect the market value of the claimant's power rights. The use of flash-boards would influence the market value upward — the substitution of a fixed crest in place of the flash-boards would influence the market value upward again — as each would have some effect on the usable value which a prospective buyer and seller would naturally take into account. We make such allowance in our award and upon the ground mentioned, but not based upon a fixed or vested right belonging to claimant.

If this holding that the relative rights of the State and claimant's predecessors in title were established at the time of the original appropriation, as hereinbefore indicated, is sound, then it follows that the subsequent dams, unless they actually added to, or took from the rights of either side, are merely substituted structures erected to accomplish the end desired in accordance with the best judgment of the State officers having charge of such constructions. They were, in fact, merely the physical expression of the then best engineering method to control the river's flow and the water elevation for navigation purposes, and, at the same time, to give opportunity to claimant's predecessors to exercise their riparian rights as already established. It follows necessarily that any such reconstruction which apparently materially altered the rights of either the State or the claimant, or the claimant's predecessors, could not actually give any greater rights

to either against the other. The State could not, without an opportunity to be heard and just compensation paid, take from claimant's predecessors or claimant any valuable riparian right which belonged to them, growing out of the status following the original appropriation. Nor could the State authorities grant or confer any additional rights on claimant's predecessors or claimant without due authority from the State and a proper consideration moving to the State because of such grant, and then, only if the additional rights so granted grew out of and were a part of an appropriation of claimant's or claimant's predecessors' property or rights by the State for its benefit. In the absence of an appropriation by the State of property or rights belonging to a power owner, the State cannot grant to that power owner any rights in the State's Oswego canal property. The State may, while making an appropriation or in the course of an appropriation, or in adjusting the damages growing out of an appropriation, make such a settlement or arrangement with a power owner as is satisfactory to both sides, provided the same is equitable to the people of the State. The power owner acts directly and the question of a satisfactory or equitable settlement, from his standpoint, is directly within his control, and he may bind himself to accept, as equitable or satisfactory, a settlement which might not actually be an equitable settlement as far as he was concerned. But the rights of the State, being adjusted through public officers, cannot be granted away in the course of such a compromise unless the compromise is, in fact, equitable to the State. A State officer is without power to make any other kind of a compromise or settlement of the State's affairs, and all persons dealing with the State must deal with notice of that fact and limitation in mind. This claimant, therefore, could not get any right, as against the State, in the increased dam openings of 1902. While the claimant may have used those openings under color of right and in good faith, he surely cannot assert a legal right to use such additional water through such increased openings, as against the State, and ask for payment on the theory that such rights are now being taken from him by eminent domain, when

the very basis of the right so stated to be taken was not such as he could then or ever make that right valid against the State. *Burbank v. Fay*, 65 N. Y. 57; *Waterloo Mfg. Co. v. Shanahan*, 128 id. 345.

There may be circumstances under which the State may be estopped, after a period of forty years, from asserting certain rights which it could grant away, but I know of no principle of law whereby the State can, by estoppel, lose a right or property in one of its going canals, which right or property it could not grant away. It may also well be that State officers, authorized in the premises, may so act as to cause a power owner to suffer considerable damages by allowing, agreeing to, or even inducing such power owner to make improvements based upon a mistaken theory or understanding of the State's rights. Such procedure on the part of the State officers might be sufficient ground to sustain an action for damages against the State on the part of a power owner, upon which question it is not now necessary to pass, but the same procedure which might be sufficient ground upon which to base an action for damages could never amount to a grant of land, water or water rights running to the claimant against the State, for which the State must pay compensation and recover back by the exercise of its sovereign right of eminent domain. The permissive user of public property connected with one of the operating canals of the State cannot ripen into a title or ownership, against the State, in the one so using, unless the user is based, in its inception, upon some grant or settlement as above mentioned. For these reasons, it appears the claimant herein cannot recover from the State any increased value in his riparian rights at the Battle Island dam because of the increased size of the openings made in 1902.

The claimant is limited in its recovery for power rights taken to a value based on a crest elevation of 307.22 Barge canal datum, with such upward influence on that value as follows the customary use of flash-boards and the upward influence following the use of a fixed crest in place of flash-boards; based also on a flow limited to two twenty-foot openings, up to one-half the flow of the stream,

when such use does not interfere with the navigation levels or necessities. The recovery as to power house, consequential damage, etc., is set forth in Judge Ackerson's opinion.

I concur in the opinion of Presiding Judge Ackerson in this claim, and, in doing so, have set forth the reasons, as I see them, for the conclusions I have drawn regarding the respective rights of the State and the owners of water powers developed at the State dams in the Oswego river.

TAGGARTS PAPER COMPANY v. STATE OF NEW YORK

No. 10335

(Dated February 6, 1918)

Claim for the recovery of legal disbursements necessarily made by claimant in the above entitled case.

The only question at issue in this application is as to the claimant's rights to costs and disbursements in the case itself. The question involves the construing of section 274 of the Code of Civil Procedure relating to the practice in the Court of Claims. That section provides that "costs, witnesses' fees and disbursements shall not be taxed, nor shall counsel or attorney fees be allowed by the court to any party." *Held*, that although the court believes the claimant's position is sound and legally correct, nevertheless, in view of a previous decision of the former Court of Claims, the court feels it should not declare unconstitutional this section of the Code but should leave this constitutional question to be passed upon by the appellate courts. The claimant's requests above referred to are therefore refused.

APPLICATION to recover the legal disbursements necessarily and properly made by the claimant in the above entitled case. For the opinion covering all the questions at issue in this case reference should be had to volume 14 State Department Reports, from pages 87 to 92, both inclusive.

Moot, Sprague, Brownell & Marcy, for claimant.

Merton E. Lewis, Attorney-General (A. F. Jenks, Deputy Attorney-General), and Benjamin McClung, for State.

Per Curiam.—The claimant requested the court to find:

(1) "That claimant is entitled to recover the legal disbursements necessarily and properly made by it in this proceeding;" and (2) "That claimant is entitled to recover the legal fees paid to the witnesses."

Section 274 of the Code of Civil Procedure relating to the practice in the Court of Claims provides in part as follows: "Costs, witnesses' fees and disbursements shall not be taxed, nor shall counsel or attorney fees be allowed by the court to any party."

Judge Rodenbeck held in an exhaustive opinion, citing a very large number of authorities, that this section does not apply to condemnation proceedings in the Court of Claims for the reason that "the enforcement of the provision would be in violation of the Constitution and deprive the owner of the compensation which he is guaranteed by the Constitution." *Brainerd v. State of New York*, 74 Misc. Rep. 100, 125.

Swift, P. J., however, in an opinion in which Murray, J., concurred, said: "This court has held that claimants are not entitled to costs and disbursements under the Code ever since the court was established * * *. I am of the opinion that the sections of the Code of Civil Procedure relating to the taxation of costs and disbursements do not apply to the Court of Claims. To hold this would be to declare section 274 of the Code unconstitutional, and I think it better to follow the direction of the Code as a part of the practice of this court until its provisions are directly passed upon by the appellate courts."

The present Court of Claims believes that Judge Rodenbeck's position is sound, and is legally correct; but in the light of the above decision of the former Court of Claims and of the express and unambiguous provision of section 274 of the Code of Civil Procedure, above quoted, the court feels it should not declare unconstitutional this section of the Code, but should leave this constitutional question to be passed upon by the appellate courts. The claimant's requests, above referred to, are therefore refused.

MINNIE F. CRANDALL, GEORGE A. DOTTER AND SARAH E. DOTTER
v. STATE OF NEW YORK

No. 1566-A

(Dated February 7, 1918)

A statutory certificate of authentication which is unsigned, in connection with manuscript maps setting forth the 1857 blue line showing the State's possessions, is not available as proof of title against the more than forty years of open undisturbed user of the property under consideration.

On July 16, 1912, a spillway on the Champlain canal was flooded so that the water of the canal flowed over the towpath of the canal and through claimants' ice houses. The flood was the result of the use of flashboards, which had been permitted by the State. The several ice houses were so connected as to be practically one building. The water running over the towpath created two gullies, each about two feet wide and one to two feet deep. Through these gullies the water flowed through the bottom of the ice houses and into the State basin, making a channel through the mass of ice. This channel became an air passage, causing a progressive melting of the ice. The ice houses began to tip toward the east. Prospective purchasers of the ice refused to buy it because of the danger of getting it out on account of the unsafe condition due to the instability of the mass. Some months later the east ends of the houses fell out. The market value of the ice at the time and place of the flooding was forty-five cents a ton. The question was raised as to whether the ice houses in part did not stand on land belonging to the State. The volumes of manuscript maps setting forth the 1857 blue line, showing the boundary of the State's possessions, were put in evidence but only as "ancient documents," for the reason that the statutory certificate of authentication which provided that they would be "presumptive evidence of title" was unsigned. *Held*, that they could not be accepted as full proof of title against the more than forty years of open undisturbed user of this property under claim of title by these claimants and their predecessors in title. On the evidence adduced an award was made as follows: \$1,100 to the owners of the ice houses (claimants in claim No. 1566-A), and an award of \$1,800 to the owner of the ice (claimant in claim No. 1565-A).

CLAIM against the State of New York for damages resulting from the alleged negligence of the State in using or permitting the use of flashboards on a Champlain canal spillway, resulting in the flooding of the claimants' ice houses.

Benjamin P. Wheat, for claimants.

Merton E. Lewis, Attorney-General (Archie C. Ryder, Deputy Attorney-General), for State.

FENNELL, J.—This claim arises out of the negligence of the State on July 16, 1912, in using or permitting the use of flashboards on a Champlain canal spillway to such an extent as to have the waters of the canal flow over the towpath of the canal and through claimants' ice houses. The ice houses were so connected together as to be one building. They extended in an easterly and westerly direction, the westerly ends of the ice houses being on the easterly edge of the Champlain canal towpath, and the easterly ends of the ice houses being on the westerly edge of the State basin. This permitted the harvesting of ice from the State basin into the easterly ends of these ice houses, and in the following summer permitted the ice to be unloaded from the westerly ends directly into canal boats for shipment to New York city.

The elevation of the water surface in the canal was 26.30, of the towpath was 27.5, of the floor of the ice houses was 18.9, of the water in the State basin was 18.0. The floor of the ice houses was only nine-tenths of a foot above the elevation of the water surface in the State basin. The water running over the towpath soon eroded the top of the same and made two small gullies, each about two feet wide and one to two feet deep. This water flowing through the bottom of the ice houses and into the State basin made a channel through the mass of ice. This channel became an air passage, which condition caused a continual melting of the ice thereafter from the bottom upward. The ice houses commenced to tip toward the east. In the fall of that year the east ends of the ice houses fell out. Before the ends had fallen out prospective purchasers of the ice refused to buy same because of the danger of getting it out on account of the unsafe condition due to the instability of the mass,—fearing to permit men to attempt to take apart the blocks of ice. The market value of the ice at the time and place of the flooding was forty-five cents a ton. What

was left of the ice was finally sold for \$1,000, the purchaser to make certain repairs to the houses.

Photographs taken in 1912, a couple of months after the water ran through under the houses from the canal, show the water in the basin side to be substantially up to the floor of the ice houses. It is obvious that a southeast wind would pile the water up against the bottom of the east face of the ice houses. This would tend to melt the ice at the bottom on that side and cause a drop. The other side being firm to the bottom, the "tip" of the whole mass of ice would be against the east faces of the buildings and tend to push them out. This was the side that actually fell out in the fall of 1912. It may reasonably be assumed that some of the damages to these ice houses and to the ice contents were due to this condition of water against the bottom of the easterly ends of the houses.

We have allowed \$1,100 damages to the owners of the land and buildings as the fair share of the State's contribution to their loss due to its negligence by permitting the water to overflow the bank of the canal, as above mentioned, and to be discharged into and through the ice houses.

Minnie F. Crandall and others, the claimants in this claim No. 1566-A, are the same persons interested in the S. Dotter Estate Ice Co. claim No. 1565-A, the damage alleged in this claim, 1566-A, being to the buildings and for loss of rentals, and the damage claimed in 1565-A being to the contents of the buildings.

We are not fully satisfied as to whether or not the 1857 blue line cuts through these ice houses in such a manner as to show a large portion of them on lands belonging to the State. The volumes of manuscript maps, setting forth the 1857 blue line, were introduced in evidence, but the statutory certificate of authentication which provided that they would be "presumptive evidence of title" was never signed, at least the only copies in the possession of the State and which were presented in court were unsigned. Therefore, they have probative value only as ancient documents. As such they were admitted, but we can hardly accept them as full proof of title against the more than forty years of open undis-

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turbed user of this property under claim of title by these claimants and their predecessors in title. Nor are we prepared to say, under such possession, that the State would not be liable to claimants for damages due to the break in the canal, the break being due to the negligence of the State, and the continuing of the damaging conditions being also due to the further negligence of the State in not discovering and remedying the conditions sooner. Having been in open undisturbed possession for over forty years under a claim of title, the claimants certainly must have had sufficient legal right to possession, in the absence of a notice to remove, to protect them against the State's negligence.

As we have said, we are not fully satisfied as to where the State's title line extends along this basin and it probably would be good judgment on the part of the State to have that question determined after a full and complete hearing of that matter. However, as the evidence appears before us in this claim, we cannot make a finding of fact and a conclusion of law that the blue line is established in law in this claim where it actually appears on the State maps, and therefore we have made an award of \$1,100 to the owners of the ice houses (claimants in claim No. 1566-A) and an award of \$1,800 to the owner of the ice (claimant in claim No. 1565-A).

ACKERSON, J., concurs.

THE NEW YORK CENTRAL RAILROAD COMPANY v. STATE OF NEW
YORK

No. 14743

(Dated February 7, 1918.)

Circumstances under which the State will be held to have assumed the cost of raising certain bridges.

A bridge owned by the claimant, spanning the Oneida river near Three Rivers Point at the junction of the Oneida and the Seneca rivers to form the Oswego river, was necessarily raised to meet Barge canal require-

ments. The State and the claimant agreed upon a form of appropriation; that the bridge be raised by claimant and an accurate cost account of the same be kept by the latter and by inspectors for the State, and that subsequently the question of liability could be submitted to the Court of Claims. On the question of liability which now is before the court the State contends that the Oneida river is in fact a navigable stream and that its navigability may be improved by ordering bridges raised without payment to bridge owners. The State further contends that this bridge was an unlawful structure, it having been erected in alleged accordance with the General Railroad Law, then contained in Laws of 1850, chapter 140, section 28, subdivision 5, but constituting a violation of such subdivision. History of the bridge in question specifically detailed. *Held*, that the violation of the statute of 1850 complained of was merely technical, especially in view of the fact that a fixed towpath bridge long antedating this bridge spans the Oneida river a very short distance westerly and at the junction of the Oneida, Seneca and Oswego rivers. Also *held*, that the use of this bridge by the owner without objection for more than forty years, and the other facts adduced, establish the fact that the bridge is one of those for the raising of which the State assumes payment. Claim allowed in the sum of \$36,988.88 with interest.

CLAIM against the State of New York arising out of the necessity of altering and raising claimant's bridge spanning the Oneida river where the Oneida and Seneca rivers join to form the Oswego river. These changes were necessary in order to meet the Barge canal requirements.

FENNELL, J.—This claim, filed December 18, 1916, arises out of the necessity of altering and raising the bridge of claimant spanning the Oneida river near Three Rivers Point, where the Oneida and the Seneca rivers join to form the Oswego river.

It having become necessary, to meet Barge canal requirements, to raise claimant's bridge, it was agreed by the State and claimant that an agreed form of appropriation be used; that the bridge be raised by claimant and an accurate cost account of same be kept by claimant and the State's inspectors who were to be present during the progress of the work, and that subsequently the question of liability could be submitted to the Court of Claims.

The language of the appropriation covers "merely so much of an easement or property right, if any, in the bridge superstructure, and substructure, including the piers, abutments and approaches

thereto, and in the land under water between the abutments of said bridge as is required to effect a raising of approximately 3.3 feet in the vertical clearance of said bridge, and to effect a deepening of the channel of said river to meet barge canal requirements involving a reinforcement to the foundations of said abutments, as shown on the clearance diagram and described upon this map and appropriation; all lands on which the approaches rest and the bridge superstructure in its entirety, together with appurtenances, remaining the property of the owner and subject to its maintenance, use and operation, except as qualified by the foregoing appropriation."

The State contends that the Oneida river is in fact a navigable stream and that its navigability may be improved by ordering bridges raised, without payment to bridge owners.

The Oneida river is in fact navigable and has been a highway of commerce for more than 100 years.

It may be well at this time to quote from a holding of the United States Supreme Court on this phase of the case. We find the following language in "The Daniel Ball," 77 U. S. 557, at page 563: "The doctrine of the common law as to the navigability of waters has no application in this country. Here the ebb and flow of the tide do not constitute the usual test, as in England, or any test at all of the navigability of waters. There no waters are navigable in fact, or at least to any considerable extent, which are not subject to the tide and from this circumstance tide water and navigable water there signifies substantially the same thing. But in this country the case is widely different. Some of our rivers are as navigable for as many hundreds of miles above as they are below the limits of tide water and some of them are navigable for great distances for large vessels, which are not even affected by the tide at any points during their entire length. A different test must, therefore, be applied to determine the navigability of our rivers and that is found in the navigable capacity. Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary con-

dition as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."

From the foregoing it might seem that the bridge in question should be raised by the claimant at its own expense. However, certain bridges were excepted from the operation of the usual rule by virtue of the Barge Canal Act, as interpreted and applied in the case of *Lehigh Valley Railroad Company v. Canal Board*, 204 N. Y. 471, where it was held that the cost of elevating such a bridge, to meet Barge canal requirements, was, by said act, assumed by the State.

The opinion of Judge Cullen in the above case contains at page 476, the following: "In *Radcliff's Exrs. v. Mayor, etc., of Brooklyn* (4 N. Y. 195) it was held that a municipality is not liable for damages caused to abutting property by change of the grade of a street, and this remains the law. But now there are statutes substantially applicable to all cities and villages which enforce compensation to abutters for damages occasioned by a change of grade, although without such a statute no legal liability would rest on the municipalities. In the case before us it cannot be said that the claim of the railroad company that the expense entailed by the improvement of the Seneca river should be borne by the State and not by it is devoid of reasonable semblance of justice and equity. The work will in no respect inure to the benefit of the railroad company. On the contrary, it will create for it a competitor. The bridge has been maintained for forty years. It may be said that in law the company should have contemplated the possibility that the legislature would at some future time make such changes in the river as to render it navigable and that those changes might interfere with the company's railroad. Yet, in fact, the probability of such an occurrence may never have suggested itself. The legislation before us cannot be distinguished in principle from that for the improvement of the bridge across the Harlem river and the viaduct on Fourth avenue in the city of New York, and whether justice, under the circumstances, required the assumption by the State of the whole cost of

rebuilding the bridges or only part thereof was a matter fairly and reasonably within the discretion of the Legislature."

The State makes the further contention herein that this bridge was an unlawful structure. That the Oneida river having been navigated by steam or sail boats at the place the bridge was erected, and the bridge in question having been erected in accordance with the provisions of the General Railroad Law, then contained in Laws of 1850, chapter 140, section 28, subdivision 5, it was an unlawful structure under that portion of said subdivision reading as follows: " * * * Nothing in this act contained shall be construed to authorize the erection of any bridge or any other obstruction across, in or over any stream or lake navigated by steam or sail boats, at the place where any bridge or other obstructions may be proposed to be placed."

The bridge in question was originally constructed by claimant's predecessor in interest, Syracuse, Phoenix and Oswego Railroad Company, in the year 1873. The vertical clearance between said bridge as originally constructed, and as reconstructed from time to time, and the waters of the Oneida river was approximately twelve feet. This clearance was reduced during floods and freshets to about nine feet. Under the Barge Canal Act it became necessary to alter and raise the bridge to give a clear passageway of not less than fifteen and one-half feet between the bridge and the water at its highest ordinary navigable stage.

Again it would seem, in view of the statutory provision above quoted, that such a bridge over such a stream was an unlawful structure.

The original water trade route, before the advent of canals or railways, extended from the Atlantic Ocean up the Hudson river to Albany, thence by wagon to Schenectady, thence up the Mohawk, with a mile carry at Little Falls, to a point near Rome, where a one-mile carry connected with Wood creek, thence along Wood creek to Oneida lake, across that lake, down the Oneida river to Three Rivers Point, thence down the Oswego to Lake Ontario, thus reaching points on the Great Lakes.

The Seneca river was not only navigable but was at one time

actually navigated by steamboats one hundred feet long, thirty feet beam and three and a-half feet draft the whole length of the river from Oneida lake to Three Rivers Point, which, of course, included the place where this bridge was built. The through commerce from the Hudson watershed to the Great Lakes and St. Lawrence watershed which passed through the Mohawk-Wood Creek-Oneida Lake route was restricted as to size of vessels by the small carrying capacity of Wood creek. Very large vessels plied on the Hudson and boats of the above dimensions could ply and did ply on the Oneida river; but when the Erie canal with its improvements and enlargements created a continuous waterway from the Hudson to Syracuse, and from there to Oswego, there was created a continuous water route between these two watersheds which had a uniform carrying capacity and a superstructure clearance of eleven feet four inches. While this carrying capacity was much smaller than that of the Hudson river, of Oneida Lake, and, in some respects, of Oneida river, nevertheless, it being so much greater than the Wood creek link, the traffic was deflected to the longer route but the one having the greatest uniform carrying capacity. This condition automatically destroyed the actual navigation of Wood creek and, to a very large extent, the actual navigation of the Oneida river for any boats larger than usable on the Erie and Oswego canals, consequently a bridge, whether a highway or railroad, which had a clearance of twelve feet did not interfere to any appreciable extent with the actual navigation of this through water route between these two watersheds. It did interfere at the time and place of construction with the passage of these larger boats, but they were already shut off from passage through this general route by canal bridges, locks and other structures. Oneida lake and Oneida river could be used by boats larger than could be accommodated by the Erie and Oswego canals, and consequently such boats were used on the lake and down the river to Three Rivers Point, where Oneida river navigation went into the Oswego canal. The towpath bridge and the railroad bridge at Three Rivers Point were both fixed bridges with a clearance of twelve feet but the other bridges on the

river upstream and between Three Rivers Point and Oneida lake had draws. Apparently the necessity for a greater clearance than twelve feet did not extend beyond Three Rivers Point. It is also reasonably certain that these two bridges with their clearance of twelve feet did not in fact interfere appreciably with the actual navigation of the Oneida river at the places where the bridges were built. The uninterrupted user of these bridges for over forty years, with no greater clearance than twelve feet, indicates that neither the State nor any citizen of the State took steps to have the bridges removed or raised. The fact that the bridges were not raised is proof either that no action to have them removed or elevated was ever prosecuted to a conclusion or that such an action, if it was brought, did not succeed. It would appear that the bridge in question was not in fact such an obstruction to commerce as to become an abatable nuisance.

Incidental passage of steam and sail boats will not be sufficient to make unlawful the bridge structures carrying practically the entire bulk of the commerce at such places. It would seem that the erection and continuous use of fixed railroad and canal tow-path bridges, having a clearance of twelve feet, across the Oneida river near Three Rivers Point during a period of more than forty years is a sufficient ground for holding that claimant's bridge was not such a navigation obstruction as to make the bridge, for that reason, an unlawful structure. *Kerr v. W. S. R. R. Co.*, 127 N. Y. 269; *D. & H. C. Co. v. Lawrence*, 2 Hun, 163; *affd.*, 56 N. Y. 612, on opinion below.

Conceding that there was actual navigation by steam and sail boats at the place where claimant's bridge was erected, and applying strictly the provision of chapter 140 of the Laws of 1850 that "Nothing in this act contained shall be construed to authorize the erection of any bridge or any other obstruction to cross, under or over, any stream or lake navigated by steam or sail boats, at the place where any bridge or other obstructions may be proposed to be placed," it will readily be seen that the bridge could not have been constructed at all under the terms of the then General Railroad Law. Applying a more liberal construction

and one that meets the reason for the statute, that no such bridge should be built which would interfere with navigation by steam or sail boats at that place, we find that the bridge was not built contrary to the reason for the statute but only to its letter, and I think it may be fairly concluded that it was built contrary to the letter of the statute. However, inasmuch as the statute was undoubtedly enacted for the purpose of keeping actual navigation free from obstruction by bridges and other structures, and in view of the fact that at this particular place substantially all of the actual navigation of the stream was carried on after the erection of this bridge in the same manner as before it was erected, it must be held that there was no real obstruction to navigation.

In *Lehigh Valley R. R. Co. v. Canal Board*, 146 App. Div. 151, 158, Presiding Judge McLennan says: "The construction of the bridge in question and the operation of plaintiff's railroad over the same in no manner interfered with the usefulness of Seneca river as a navigable waterway for the reason that during that entire period and wholly independent of any acts committed by the plaintiff or its predecessors, such river was non-navigable for all practical purposes.

"It would be an unreasonable interpretation of the statute to hold that a railroad company was prohibited from crossing a stream or watercourse although at one time navigable but which because of the changed conditions had been abandoned and with the consent and acquiescence of the State its navigation made impossible."

The State ordered the claimant to raise its fixed bridge three and three-tenths feet, not to accommodate the navigation of steam and sail boats such as were used when the bridge was built or such boats, of a much larger dimension, as might be used in navigating the Oneida river, but, on the contrary, have only demanded an elevation sufficient to accommodate navigation as limited by the locks, bridges and structures of the Barge canal,— which limitation, in itself, is a measure of the kind and character of navigation that is to be carried on on the Oneida river and of the kind and character of navigation that must not be interfered with there or

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elsewhere along the line of the Barge canal either in its ditch construction or canalization portions. It is a case of history repeating itself. This is now the measure of the navigation of the Oneida river at the place in question just as the original Erie canal with its improvement was formerly the measure of the navigation on the Oneida river at the same locality.

The State now fixes, by the terms of its demand in this case, the elevation of fixed bridges to be only sufficient to accommodate navigation measured by the capacity of the Barge canal itself. This is a fixing of the character of navigation of the Oneida river at the location of claimant's bridge. This necessity, so determined, requires that a fixed bridge must be three and three-tenths feet higher than the old bridge to comply with the statute. The State is hardly in a position to claim that the former elevation of twelve feet—being eight inches more than the required elevation of bridges on the Erie and Oswego canals—was not at that time a reasonable measure of the navigation necessities of the Oneida river, when the present elevation ordered by the State is measured by the present Barge canal necessities, and requires a raising of only three and three-tenths feet.

While there seems to have been a technical violation of the statute which was in force at the time of the construction of the bridge, we think that the spirit of the statute was complied with when a twelve-foot clearance was provided for and that, while steam and sail navigation existed to a degree at that time, that the real, actual improved navigation of the stream was not interfered with by a fixed bridge at that elevation at that place, particularly in view of the fixed towpath bridge, long antedating this bridge, which spanned the Oneida river a very short distance westerly and at the junction of the Oneida, Seneca and Oswego rivers.

We reach the conclusion that in spite of the apparent technical illegality in the original construction of the bridge, that its use without objection for more than forty years, its capacity for accommodation, by a twelve-foot clearance, of substantially all the navigation passing that point and the State's present determination

not to demand a renewal or a drawbridge but simply to increase the elevation three and three-tenths feet, bring the bridge within the doctrine of the Lehigh Valley case as being one of the bridges for the raising of which the State assumed payment. *Lane Bros. Co. v. State*, 11 State Dept. Rept. 117, 126.

According to the report of State Engineer Bond, made prior to the Barge Canal Act, an estimate was made of the cost of twenty-seven railroad bridges which it was found necessary to change, included in which number was claimant's bridge across the Oneida river at Three Rivers Point, being the bridge in question here. The cost to the State of changing this bridge was estimated at \$31,520. The actual cost of altering and raising the bridge, as checked by the State inspectors during the progress of the work, and as admitted by the State, was \$36,988.88. An item for legal costs, amounting to \$440.52, made by claimant is objected to by the State as being an improper charge against the cost of elevation of the bridge. We think the State's contention in this respect is correct and have subtracted the item of \$440.52 from the original claim of \$37,429.40, leaving a balance of \$36,988.88.

Claimant's exhibit No. 16, being a letter from George W. Kirtledge, chief engineer of the New York Central and Hudson River Railroad Company, to John A. Benschel, State Engineer and Surveyor, was offered and received, but with a reservation that the ruling be made at the disposition of the case and the party ruled against be given the exception. The objection to the receipt of the letter, exhibit No. 16, in evidence is sustained, and the claimant is given the exception.

The preliminary reports of the State Engineer shown in various Assembly and Senate journals, including the Bond report, so-called, and the various portions of the Senate and Assembly journals prior to the enactment of the Barge Canal Act which were objected to and received conditionally, are received in evidence, and the State is allowed the exceptions.

An order for judgment for \$36,988.88 with interest from June 18, 1915, has accordingly been made.

ACKERSON, J., concurs.

STATE DEPT. REPT.—Vol. 15 5

RIBSTEIN-HOLTER COMPANY v. STATE OF NEW YORK

No. 15079

(Dated February 7, 1918)

A contractor familiar with the form of State contracts is chargeable with knowledge of the fact that a requirement mentioned on the plans but not in the specifications is nevertheless a part of such contract.

The claimant by its president and treasurer entered into a contract, one of the specifications of which was "whenever any of the following words and expressions are used in these specifications it is understood to have the meaning herewith accompanying." The question herein to be considered is as to the use of the words "imported material" on a plan accompanying a highway contract taken by claimant. The claimant contends that the provision quoted applies merely in case the term under discussion is included in the specifications but not when the term appears on the plans and is omitted from the specifications. *Held*, that the claimant, being thoroughly familiar with State highway contracts and the work to be done thereunder, cannot now be heard to say that the company did not know that the words in question were on the plans. Even if he had no such knowledge he must be presumed to have had knowledge that under the itemized proposal the company certifies to having carefully examined the plans, specifications and form of contract and waives all right to plead any misunderstanding regarding the same. Claim dismissed.

CLAIM against the State of New York arising from the use of the words "imported material" on a plan accompanying a highway contract taken by the claimant. The claim necessitates the construing of the words above quoted in such a contract.

Hugh J. O'Brien and Charles A. Bostwick, for claimant.

Merton E. Lewis, Attorney-General (Henry P. Nevins, Deputy Attorney-General), for State.

FENNELL, J.—This claim arises out of the use of the words "imported material" on a plan accompanying a highway contract. Their meaning is stated in the general specifications to be "any

material used in the work which is brought by water or railroad or other common carrier."

The 1st paragraph of the specifications reads as follows: "Whenever any of the following words and expressions are used in these specifications it is understood to have the meaning herewith accompanying."

It is contended by counsel for claimant that the meaning above set forth must be applied only when used in "these specifications" and not when the words "imported material" appear on the plans. The "itemized proposal," which the claimant executed, contained the following: "The undersigned also hereby declare that he has or they have carefully examined the plans, specifications, form of contract, and that he has or they have personally inspected the actual location of the work together with the local sources of supply, has or have satisfied himself or themselves as to all the quantities and conditions, and understands that in signing this proposal he or they waive all right to plead any misunderstanding regarding the same."

It would seem that the claimant, having executed by its president and treasurer, Mr. Ribstein, an instrument containing the above clause, and Mr. Ribstein being thoroughly familiar with State highway contracts and the work to be done thereunder, cannot now be heard to say that he did not know that the words in question were on the plans. It may be the fact that he did not, but, in view of the above clause, he must be presumed to have known.

We cannot agree that the words "these specifications" should have the limited construction urged and thus not be inclusive of their use on the plans.

These words "imported material," and their described meaning, have been used in the State's standard form of highway contract for a definite purpose. It has been found from experience, and it is clearly based on sound judgment, that the more information the State highway authorities can get as to sources, kinds and quantities of highway material, and then give publicly to prospective bidders, the lower the bids will be. If the

contractors were "bidding in the dark" as to sources of materials, they naturally and properly would use a larger factor or margin of safety which, of course, would add to the cost of the road without adding to its quality. To obtain such information inspections are made of the neighborhood of the proposed contract and the information thus obtained is placed on file and then brought to the attention of the bidders. Where no satisfactory local materials are discovered that condition is made known to bidders by the designation "imported materials." If a State inspector finds suitable material and informs a contractor instead of the Highway Commissioner, the bids will all be high, but one would be a little lower than the others, and one contractor will make a much larger profit because he will use the local material disclosed to him secretly by the inspector. This makes a higher price to the State than would be the case if the bidders were bidding on a known source of local supply. Further, it would not be fair to the other competing bidders if, after a contract was let, where no local supply was indicated, the successful bidder was allowed to use such a source. It might also be added that such permission to use local material would be solely for the benefit of the contractor. The State being bound to pay the contract price, and as the contract price is based on the lowest bid, and as all the bids were made in view of the absence of local material, and the necessity for using imported material, it will readily be seen that the contractor and not the State would benefit by the use of the local material.

We think the Highway Commissioner is fully authorized to incorporate in highway contracts such provisions as will reduce or eliminate improper or corrupt transactions in the obtaining or carrying out of highway contracts.

It is further contended by counsel for claimant that such a holding would be illegal in this case as it does not permit competition with local suitable material. We are not inclined to agree with him. The question of restricted competition can hardly be urged by a claimant who raises it after the contract is made and the State bound to pay a contract price. Mr. Ribstein

testified that he did not discover the local supply until after the contract was executed. He is therefore estopped from claiming that he has been harmed in any way by not being allowed to use a source of which he had no knowledge when he bid and when his company obtained and executed the contract. In supporting the State's position as to this phase of the claim we feel that we are not depriving the State of the benefit of competition but rather the reverse. We feel confident that in holding the provision valid and the Highway Commissioner fully warranted in making it, we are supporting a provision that will and does bring about competition at the proper time, namely, while contractors are bidding for work, and which does not raise the legal fiction of reducing competition to give a contractor more profit after the "day of competition is past."

It must be definitely understood that the remarks above made as to reducing or eliminating "improper dealings" are not at all to be applied to this contractor or to this claim — but merely the reasons in the abstract that warrant the insertion of the provision.

Counsel for claimant urges that such a provision is an advertisement that the State employees, charged with searching for sources of supply, are not honest and cannot be trusted, and that such a policy will make them dishonest even if they were not so before.

The answering argument is plain. The standard State contracts, while apparently arbitrary and one-sided, are, in fact, the grouping of the terse, explicit, residual rules, restrictions, definitions, etc., remaining after many years of experience with contractors and State employees. They are "the survival of the fittest." Surely the State may learn by experience, and a rule or holding, founded on experience, that is meant to and tends to eliminate improper dealings, is not an advertisement of dishonesty but rather an attempt to apply in a concrete given state of circumstances the Christian prayer of all men, "Lead us not into temptation."

This claim should be dismissed and it has been so ordered.

PARIS and ACKERSON, JJ., concur.

PUBLIC SERVICE COMMISSION

FIRST DISTRICT

In the Matter of the Application of THE NEW YORK AND NORTH SHORE TRACTION COMPANY for an Order Increasing the Rate of Fare to be Charged by it Between any Two Points on Its Lines in the City of New York, Under Section 49 of the Public Service Commissions Law

Case No. 2217

(Public Service Commission, First District, January 10, 1918)

History of petitioning company and outline of previous proceedings in regard to such company.

The revenue of a public service corporation should be sufficient to operate and maintain the property and also to give a reasonable return to the owners thereof.

Effect of contract between the city of New York and the petitioning company that not more than five cents should be charged for a continuous ride from any one point to any other point on its lines within the city limits.

Power of the Commission to put in effect a seven-cent rate on the petitioner's lines within the city of New York.

Consideration of the procedure under which the requisite rights for the use of public streets may be secured for a projected street railroad — constitutional limitation of legislative power.

Power of the Legislature subsequently to modify an agreement expressed in a city franchise for a projected street railroad.

Power of the Commission to increase a rate above a maximum indicated by statute.

The petitioning corporation was incorporated under the Railroad Law on August 6, 1902, as the Mineola, Roslyn and Port Washington Traction Company. Its termini were to be outside the city of New York. The following year the corporate name was changed to the New York and North Shore Traction Company. This company brought into operation on the Port Washington-Mineola line 2.69 miles, on the Mineola-Hicksville line 6.77 miles and on the Roslyn-Flushing-Whitestone line about 13 miles of surface railroads. The road now extends from the city line at Little Neck in Queens borough to the western terminal at Farrington and State streets, Flushing, a distance of 6.66 miles. Branches extend from Flushing to Whitestone and Whitestone Landing on the sound.

Within the city its lines are double-tracked; in Nassau county they are single track with sidings. The company is not identified with any other transportation interests within the city of New York.

A public service corporation must have a revenue sufficient not only to operate and maintain the property but also to give a reasonable return to those whose invested money remains in the enterprise. The Commission should have due regard among other things to a reasonable average return upon the value of the property actually used. Adequate return must find its basis in the first instance in an adequate gross revenue. Various factors, however, may operate to prevent a fair return in spite of adequate gross earnings: a territory may be too sparsely settled; the entire enterprise may have been unwise; the particular mode of service may be inefficient for the territory; the fare may be too low.

The franchise which the petitioning company secured from the city of New York included a provision that upon the termination of the contract, which was for twenty-five years, or if the same be renewed then at the termination of the renewal term, the tracks and equipment of the company should become the property of the city without cost. The value of the property which will revert to the city has been found to be \$383,191. The terms of the contract and other public charges such as taxes have led the company to ask for leave to charge an increased rate as a substantial part of any sum taken from passengers finds its way back into the public treasury under the franchise terms and at least no later than 1950 all the property of the company in public streets becomes outright the property of the city without any payment therefor by the city. Despite this fact, however, the city insists that the fare shall not be increased above the franchise limitation of five cents.

The question of the power of the Commission to put in effect a seven-cent rate on the petitioner's lines within the city of New York presents a question of far-reaching importance. This question has not been decided by any controlling authority within this State. In the present instance co-operation by the petitioner, the city of New York and the Commission may lead to an early adjudication on this issue, on which important public rights depend. Basic questions as to the demarcation between state and municipal powers are involved. Since 1875 section 18, article III of the New York State Constitution has contained a fifteenth subdivision which in part provides that "no law shall authorize the construction or operation of a street railroad except upon the condition that the consent * * * also of the local authorities having control of that portion of a street or highway upon which it is proposed to construct or operate such railroad be first obtained, * * *." The five-cent limitation was included in the constitutional consent of the local authorities and the question becomes one of determination of the scope and effect of the action of the city under the constitutional requirement.

When the promoters of a street railroad project seek to obtain a valid basis for the construction and operation of their lines they must

procure from the State their incorporation and franchise rights, and where they seek to lay their tracks and operate their cars along the streets of a city or other municipality they must obtain due "consent" of the local authorities, and in addition must obtain from the Public Service Commission determination of the public convenience and necessity for the proposed new line and approval of the exercise of the franchise therefor. The chartering of a street railway corporation by the State confers upon it no right to proceed along public streets. The Constitution, article III, section 18, requires the action and consent of the local authorities. The streets of a city do not belong to the city but are held in trust for the use of all the people of the State.

For certain purposes the Legislature is granted certain powers in reference to such streets, but these powers cannot be urged as against constitutional limitation, and where the Constitution provides that no street railway shall be constructed along a public street without the consent of the local authorities, the power of the Legislature is to that extent qualified and limited. The city is empowered to exercise the legislative power of determining the conditions under which it will grant its consent, if at all. The agreement between the petitioning company and the city of New York in regard to a five-cent fare was within the power of the city under the constitutional provision.

Held, that upon the whole record in this case the Commission is not at present vested with power to authorize a seven-cent fare, which would be warranted by the company's financial circumstances and its right to earn a fair return upon the fair value of its property used in the public service. The suggestion is made, however, that the case be held open sufficiently long for the petitioning company to seek the consent of the city to such increase, but that if such action be not taken by the company an order be promptly entered herein denying upon the grounds stated the application of the petitioner.

WHITNEY, Commissioner.—The New York and North Shore Traction Company, a street surface railroad corporation operating within the borough of Queens and the adjoining county of Nassau, asks the Commission to adjudge its present fare of five cents within the city of New York to be unreasonably low and unremunerative, and to fix seven cents as the maximum to be charged for a single continuous trip between points within the city limits. By one of the terms of the contract which it entered into with the city of New York as a condition of obtaining the municipality's consent to the construction and operation of the railroad along public streets, the company had agreed to charge no more than five cents for such a trip; but the company now contends that

because the five-cent fare now fails to yield a fair return upon the value of its property, the Commission is vested with the power and duty of fixing a higher rate or of prescribing for the portions of its lines within the city of New York a "zone" system perhaps similar to that authorized by the Public Service Commission for the Second District for the lines in Nassau County.

The conclusions hereinafter reached as to the powers of the Commission in the premises give added reason for a careful statement of the full facts regarding the petitioner's status, finances and operations. The matters hereinafter set out may be taken as the findings of fact made by the Commission.

HISTORY OF THE COMPANY

The corporation petitioner was incorporated under the Railroad Law on August 6, 1902, as "The Mineola, Roslyn and Port Washington Traction Company," which indicated its contemplated *termini* — all outside the city of New York. Certain franchises then obtained finally lapsed by non-user. On August 26, 1907, following new plans, the corporate name was changed to "The New York and North Shore Traction Company" and the work was launched which resulted in the beginning of operation on the Port Washington-Mineola line, a distance of 2.69 miles, on or about February 1, 1908; the Mineola-Hicksville line, a distance of 6.77 miles, on or about March 1, 1909; and the Roslyn-Flushing-Whitestone line, a distance of about 13 miles, on or about November 1, 1910. The lines of the company within the city of New York extend from the city line at Little Neck, in Queens borough, through Douglaston, Bayside, Auburndale and Flushing, to a western terminal at Farrington and State streets, Flushing, a distance of 6.66 miles. At Chestnut street and Central avenue, Flushing, a branch extends 2.25 miles to Whitestone and Whitestone Landing, on the shores of Long Island sound. The petitioner's lines within the city of New York are double-tracked; in Nassau county, they are single track with sidings. The petitioner and the ownership of its stock and securities are not identified with any other transportation interests within the city of New York.

SITUATION AND SERVICE OF THE COMPANY

The general property of the petitioner consists of 29.46 miles of road, of which 8.91 miles are in the borough of Queens, city of New York; a power house at Bayside (Queens borough), a sub-station, car barn and office building at Roslyn (Nassau county), and a small car barn and office building in Flushing (Queens borough). It owns nineteen closed cars, of which 15 are usually in service, besides a sprinkling car, snow plow, sweeper and work car.

On its Whitestone Division (Flushing to Whitestone), the petitioner operates cars on a twenty minute headway from 5:25 A. M. until 10:45 P. M., then a 40 minute headway until 1:40 A. M., when service is suspended. On Sundays, during the summer, a 15 minute headway is used instead of the 20 minute headway.

On the Little Neck Division (Flushing to Little Neck), a half hour headway is followed from 5:30 A. M. until 2:00 A. M., except that special "runs" leave Flushing at 6:30 A. M. and 7:45 A. M. and on the return leave Little Neck at 7:45 A. M. and 8:00 A. M. In the afternoon a special "run" leaves Flushing at 4:15 P. M. and Little Neck at 5:30 P. M. On Sundays during the summer this division operates on a 15 minute headway.

The service from Flushing to Hicksville (Nassau county) is on an hourly basis from 5:30 A. M. until 9:30 P. M., except in the summer, when a 30 minute headway is maintained. At Roslyn these cars connect with the Port Washington Division, on which cars run every 30 minutes in summer and hourly during the rest of the year.

Beyond a doubt, the convenience of those who ride upon its lines, and the convenience of some who may be deterred from riding by reason of the comparative infrequency of the service, would be promoted by a shorter headway, more closely approximating that maintained on other lines in Queens and other metropolitan boroughs. The long "waits" between cars may well operate to drive away some traffic which the road might otherwise secure. It does not, however, appear that the small volume of traffic is due to the infrequency of service; the casual relation

seems quite the reverse. Efforts of the company to shorten its headway have not been attended with sufficient increases in number of passengers carried to warrant the added expense. The company's headway, during the hours when cars are run, has at all times been less than the minimum specified in its contract with the city authorities. It does not appear, however, that the cessation of operation during the late hours of the night has been sanctioned by the city under the contract, so as to take this nocturnal suspension of service out of the category of a violation of the agreed conditions of the city's consent.

Another fact which has operated to deter use of the road has been the slow speed of the cars and the uninviting appearance of the cars and property generally. The cars move rather too slowly for acceptable city service (11.27 miles per hour in 1916), and outside the city, the speed maintained has declined from year to year until too slow to induce traffic. The rolling stock and property are in fact kept in reasonable operating condition, but economy has led to savings which detract from appearance. The cars need repainting; complaints are made that they are not kept clean enough; the buildings are rather more poorly kept up than are the cars; and the roadbed is in many places grown over with grass and weeds. These conditions do not detract from the safety or efficiency of service, but they do lessen the attractiveness of the road to its potential patrons. It is evident that the scarcity of business has led to the severest economies in every expense which can be avoided or postponed, and that the management has properly saved on paint and grass cutting rather than on factors which might menace safety. That the consequences of inadequate revenues have in turn adversely affected traffic I do not doubt.

This brings us to a further comment on the position and possibilities of the petitioner's lines as a factor in supplying the transportation needs of the territory through which it passes. Although Queens borough is a part of New York city, the petitioner's lines pass through a series of populous, separated communities, of a type commonly found in suburban areas. In this respect, the territory traversed by the petitioner inside the city differs little from that through which it passes in Nassau county. Places like

Flushing, Bayside, Little Neck, Whitestone, and the like are suburban communities, made up in overwhelming proportion of families of which one or more members are engaged in business in the borough of Manhattan or in Long Island City. These are communities in which families occupy individual houses; the lots or surrounding grounds are usually large; farms and country estates abound; automobiles are commonly owned and used; the population per square mile of territory is not large, as compared with usual city conditions. Many factors tend to make the nearby lines of the Long Island Railroad Company the most natural mode of travel; and conditions as to traffic by the petitioner's line are not as yet, on the whole, as favorable as was to be expected at the time the road was projected and built.

Both divisions are paralleled by the electrified lines of the Long Island Railroad Company at a distance ranging only from a few hundred yards to half a mile. The railroad furnishes a faster service, at times as frequent a service, and although its one trip and excursion rates are higher than the petitioner's fare, its commutation, mileage and trip tickets give rates approximating the petitioner's and are commonly used by residents of this region.

PREVIOUS PROCEEDINGS REGARDING THIS COMPANY

The compactness and convenience with which it was possible to present the petitioner's case in this proceeding, and the absence of confusion or controversy as to the accuracy or significance of the items appearing in the various exhibits submitted to the Commission, may be ascribed almost wholly to the fact that the petitioner's financing, accountancy and operations, except in respect to the sufficiency of its depreciation reserve, have been conducted in conformity to the Commission's rulings and directions. In consequence, it was possible, with little difficulty, to present the petitioner's property costs, operating statistics, revenue needs, and the like, with complete fairness and clarity. Cross-examination disclosed only two or three inconsequential items of variance, and the advantages gained from compliance in good faith with the requirements of the uniform system of accounts were manifest at every stage of the proceeding. Proof of the elements of the value of the

property for rate purposes was thus available in compact and convincing form.

Before the Commission sanctioned, on March 8, 1912, the bond issue and supporting mortgage, the books and vouchers of the petitioner and the two construction companies which built each a portion of the road were carefully scrutinized. The Commission certified the items which it regarded as properly chargeable to capital account, and the company altered its books accordingly. Subsequent additions have been likewise under the scrutiny of the Commission. Thus the amount reported by the company as fixed street railway capital fairly represents the actual cost of the plant and property as determined by the Commission after a thorough examination, and inasmuch as these records of actual outlay are available, they constitute, when taken in connection with accrued depreciation, the preferable basis for determining present value for the purposes of this proceeding (*People ex rel. Kings County Lighting Co. v. Willcox*, 156 App. Div. 603, 611; 210 N. Y. 479), and are so tendered by the company.

The facts found and stated in previous opinions as to the property of this petitioner may be regarded as a part of the findings in this proceeding. *Matter of Bond Issue of N. Y. & North Shore Traction Co.*, 3 P. S. C. R. (1st Dist. N. Y.) 63, 205.

A summary of the petitioner's fixed street railway capital on June 30, 1917, and of the securities approved, authorized, issued and outstanding, may be set forth as follows for the purpose of showing the difference between the fixed capital and the securities:

**SUMMARY OF FIXED STREET RAILWAY CAPITAL, JUNE 30, 1917,
AND SECURITIES APPROVED, AUTHORIZED, ISSUED AND OUT-
STANDING, SHOWING DIFFERENCE BETWEEN FIXED STREET
RAILWAY CAPITAL AND SECURITIES**

	June 30, 1917
Fixed street railway capital installed since December 31, 1908	\$1,253,272 65
Fixed street railway capital December 31, 1908.	358,735 74
Total	\$1,612,008 39

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Securities approved, authorized, issued and outstanding:	
Common stock approved, Case 1398.....	\$150,000 00
Common stock authorized, Case 1398.....	747,500 00
Common stock authorized, Case 1770.....	81,850 00
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Total stock	\$979,350 00
First mortgage bonds (5%) authorized, Case 1398	800,000 00
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Total securities	\$1,779,350 00
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Difference between securities and fixed capital is represented by discount on bonds, material and supplies, cost of bonds deposited with city of New York, and other items for which securities were allowed, but which were ordered credited to fixed capital and written off through suspense account, Case 1398.	
Total stock and bonds authorized, Case 1398....	\$1,697,500 00
Total fixed street railway capital authorized, Case 1398	1,525,298 99
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Difference	\$172,201 01
<hr/>	
Discount upon bonds authorized, Case 1398....	\$97,500 00
Mortgage tax, discount and other expenses in connection with issue of \$350,000.00 bonds, Case 1398	5,162 50
Loss upon sale of cable, Case 1398.....	6,517 46
Loss of property represented by original issue of capital stock not previously retired, Case 1398.	18,320 04
Material and supplies, Case 1398.....	30,909 27
Fifteen thousand dollars face value of bonds (deposited with city of New York).....	13,791 74
<hr/>	
Total	\$172,201 01
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In other words, the company's capitalization in stocks and bonds is shown by this table to amount to \$1,779,350, face or par value. While this entire amount has been approved by the Commission, not all of it has been approved for capital purposes. The table shows a difference of \$172,201 between the amount of securities and the permanent investment in real estate, construction and equipment, defined in the Commission's accounting classification as fixed capital. More than half of this difference is accounted for by the discount on bonds and the remainder represents about \$31,000 of materials and supplies, and other property such as \$15,000 of corporate stock of the city of New York owned by the company but held by the city as security for the full performance of the company's franchise obligations — no doubt including maintenance of the five-cent fare.

THE VALUE OF THE COMPANY'S PROPERTY FOR THE PURPOSES OF THIS PROCEEDING

The best index to ascertainment of the actual cost of the company's property to the end of June, 1917, will be gained from the comparative general balance sheet, showing the financial condition at the end of each year of operation, on file with the Commission.

From this it appears that the actual cost of the petitioner's property (and so, aside from depreciation, the basis for the determination of value in this proceeding) is \$1,611,008.39, which figure has been reached by deducting the sum of \$1,100 from the amount shown in the table. The sum of \$1,100 represents the cost of a parcel of land acquired for a station at Whitestone, but never used for any transportation purpose.

DEPRECIATION AND PRECAUTIONS AGAINST THE IMPAIRMENT OF CAPITAL

Pursuant to the direction of the uniform system of accounts of street railroad corporations as prescribed by this Commission, the present petitioner filed with the Commission, on September 4, 1915, a notification of its adoption of, and agreement to follow, a rule requiring it to charge, month by month, to the account "depreciation of equipment" $\frac{3}{4}$ per cent of its gross receipts and to the account "depreciation of way and structures" $1\frac{1}{2}$ per cent

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of its gross receipts, for each such month, these percentages being stated by the company to be calculated to yield a reserve estimated at that time to be sufficient to cover the purposes indicated. These rules became effective as of July 1, 1915, and of course have a bearing upon the determination of the amounts which are deductible in determining the present value of the petitioner's property for rate-making purposes.

The requirements of the uniform system of accounts as promulgated by the Commission of course have the force of law. *People ex rel. Bridge Operating Co. v. Public Service Commission*, 153 App. Div. 129, 137; 138 N. Y. Supp. 434; *People ex rel. Kings County Lighting Company v. Straus*, 178 App. Div. 840; 166 N. Y. Supp. 196. The Commission has the power, through any suitable proceeding which gives the company full opportunity to present evidence and be heard, to determine the amount of money the company ought to set aside annually so as to make provision for the probable depreciation of its property, and such an order, with the resultant readjustments of the company's accounting system, thereupon becomes an integral part of the uniform system of accounts as applicable to that company. *People ex rel. Kings County Lighting Co. v. Straus*, *supra*. Determination of the amount of a public service corporation's annual reserve to make provision for depreciation of property is one of the Commission's powers and duties, closely related to integrity of security issues and the upkeep of the service.

As to this petitioner, the Commission had not, up to this time, undertaken itself to prescribe, through the uniform system of accounts, the precise amount which expert judgment estimated would be necessary to cover wear and tear, obsolescence, and inadequacy accrued. On the contrary, as to this and many other companies, the Commission's order had prescribed that the company should itself estimate, as best it could, the amount to be set aside annually by it for such purposes, and embody the same in a rule filed with the Commission. Such rule so filed by this petitioner on September 4, 1915, had of course the effect, so far as the petitioner was concerned, of binding it to set aside the amount required by the rule, and so continue to treat as applicable to depreciation

purposes any amounts set aside by it pursuant to its own rule, so filed, with the same force and effect as though the Commission had itself prescribed the rule; and as to any matters depending upon the observance of the rule and the accuracy of expert estimates of the reserves needed to meet future-occurring conditions, the rule so filed has similar status as regards the Commission itself (*People ex rel. Kings County Lighting Co. v. Straus, supra*); subject to the qualification that the company may itself modify the rule at any time by filing a new rule with the Commission and subject also to the right and power of the Commission to prescribe by order a different rule, after notice to the company, hearing, and opportunity for the presentation of all data.

"Such rule may," the uniform system of accounts provides, "be derived from a consideration of the said corporation's history and experience during the preceding five years and the accrual may be on the basis of revenue car miles. Whatever may be its basis, such rule and a sworn statement of the facts, expert opinions and estimates upon which it is based, shall be filed with the Public Service Commission." In a rate case, however, the Commission is required to ascertain the reasonableness of existing rates in the light of the return which they afford upon the fair value of *existent* property used in the service, and in determining the extent of obsolescence and depreciation, the Commission is not bound by advance estimates of the amounts probably necessary to make provision for prospective conditions. The question is not how much somebody *estimated* would probably be necessary to cover the depreciation over a period of years, but what the depreciation up to the time of the rate hearing has in fact been, whether provided for or not. The data filed by the petitioner in the letter transmitting its rule did not comply with the requirements of the Commission's order, and the absence of the "facts and expert opinions" upon which the company should have based its rule, together with the unconvincing quality of the evidence as to the reliability of the rule in measuring the *pro rata* diminution in the value of the property according to the expired period of life, leads me to regard the company's rule as of no conclusive weight in determining the depreciation deduction to be here made from

the property's cost new, to ascertain present fair value. That the corporate directors have not in the past set aside a sufficient amount for depreciation does not give basis to a claim for an assumption of value represented by property which no longer exists (*Knoxville Water Co. v. City of Knoxville*, 212 U. S. 1, 13, 14), and a physical valuation for rate purposes which does not find and allow for the amount of depreciation of physical items is incomplete (*Minnesota Rate Cases*, 230 U. S. 352), although if, by reason of insufficiency of the rates, or reserves, or otherwise, the public has not repaid the utility the depreciation which its property has in fact undergone, the utility might well have an equitable claim against the public on account of such depreciation. *Matter of Chesapeake & P. Telephone Co.*, P. U. R. 1916 C, 925, 959-960. Of course no rule of depreciation formulated by a public utility company could have standing in a judicial proceeding as to present values of property, unless as to method of calculation it complied with the formula promulgated by the Court of Appeals in *Manhattan Ry. Co. v. Woodbury*, 203 N. Y. 235, that "The annual allowance for depreciation should be computed by dividing the values of the various accounts of tangible property by the number of years of their respective estimated physical lives." Upon the whole situation, it is my opinion that the Commission is here free to ascertain, from all the facts, the depreciation in fact accrued, whether provided for by the rule or not, and be governed accordingly.

As to the amounts which were, and should have been, set aside by the petitioner from its inception, in connection with these accounts, the petitioner submitted a statement showing by years, by totals, and by averages, its gross revenue from street railway operation and the amounts expended and charged to its maintenance account in operating expenses, including the amount charged for depreciation during the two years the rule was in effect, that is to say, from July 1, 1915, to July 1, 1917.

To show accrued depreciation from the beginning of complete operation the petitioner submitted a comprehensive table based on the assumption that the percentages fixed by it in its filed rule in 1915 had been in force, as to both depreciation of equipment and

depreciation of way and structures, from July 1, 1910 to July 30, 1917.

On the assumption that the "straight line" method of figuring depreciation were to be applied to all depreciable property throughout the period of operation, on the basis of an average depreciation of three per cent a year, a detailed calculation was also submitted by the petitioning company, together with a statement showing the method used by the company's accountants in arriving at the average percentage of depreciation.

In a number of respects the "Table of Lives" used by the petitioner in computing the depreciation of its property was challenged by the engineers and valuation experts of the Commission, who made a careful study of the company's property and experience data, and prepared the following summary of points of divergence:

TABLE SHOWING LIVES USED BY P. S. C. ENGINEERS IN COMPUTING DEPRECIATION ON PROPERTY OF THE NEW YORK AND NORTH SHORE TRACTION COMPANY

Property	Life in Years	Annual Depr. Rate
Organization, Franchises, Other Intangible St. Ry. Capital, Right of Way, Other Street Ry. Land		
Grading, Ballast, Ties, Rails, Rail Fastenings and Joints, Special Work, Track Laying and Surfacing, Paving, Roadway Tools, Crossings, Fences and Signs.....	16-2/3	6-0/0
Interlocking and Other Signal Apparatus, Telephone and Telegraph Lines, Transmis- sion System, Distribution System, Dams, Canals and Pipe Lines, Shops and Car Houses, Docks and Wharves, Furnaces, Boilers and Accessories, Steam Engines, Power Plant Electric Equipment, Miscel- laneous Power Plant Equipment, Substation Equipment, Shop Equipment, Electric Equipment of Cars, Miscellaneous Equip- ment, Poles and Fixtures.....	20	5-0/0

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	Life in Years	Annual Depr. Rate
Bridges, Trestles and Culverts, General Office		
Bldg. and Fixtures, Stations, Waiting		
Rooms and Miscellaneous Bldgs.....	25	4-0/0
Revenue Cars, Other Rail Equipment.....	33-1/3	3-0/0
Power Plant Buildings, Substation Buildings.	50	2

I am of the opinion, from the testimony in this case as well as from the Commission's extensive experience and data upon which the testimony of the Commission's experts was based, that the somewhat shorter "lives of property" testified to by the latter in the indicated instances are fully sustained.

Accordingly I find that the accrued depreciation of the property of the petitioner corporation used in the public service was, from the beginning of operation to and including June 30, 1917, the sum of \$577,048.11, and that deduction should be made from the actual cost figures accordingly, in ascertaining the present unimpaired investment of the petitioner on a cost-new-less-depreciation basis.

The matter of the company's proper depreciation reserves was thus thoroughly litigated upon the hearings, and the petitioner was fully apprised that the Commission was considering the advisability of exercising its power to make the acceptance of a proper order as to depreciation a condition of the granting of any change in fares. The company accepted this issue in an altogether frank and admirable way, and readily expressed its willingness to be bound by any reasonable requirement the Commission might prescribe, if only its revenues might be augmented to enable the setting aside of any substantial reserve at all.

Accordingly I am of opinion that, in order to prevent any possible impairment of capital, any order sanctioning an advance in rates should contain as a condition a clause in the following form: "Applicant is further directed to make the charges to operating expenses for the upkeep or maintenance of its road and equipment required by the provisions of the Uniform System of Accounts for Street and Electric Railways at the rate of \$75,000 per annum,

of which amount \$60,000 shall be charged for maintenance of way and structures and \$15,000 for maintenance of equipment."

Such a requirement would not prevent the company from paying interest on its bonds, even at the expense of the depreciation account. It would, however, prevent the paying of any dividends upon stock until all borrowings from the depreciation fund had been replaced.

INVESTMENT OUTLAY LESS DEPRECIATION

As a basis for the computation of a fair return under the issues presented in this proceeding, we have therefore this situation:

Fixed street railway capital (Actual investment outlay in the petitioner's property used in the service)	\$1,611,008 39
Accrued depreciation	577,048 11

Cost new less depreciation=present value.	<u>\$1,033,960 28</u>
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In view of known conditions as to current prices, this figure may be regarded as below an estimate of value based upon present reproduction costs and as conservatively representing the fair value of the applicant's property for rate-making. The petitioner has, however, stated that it does not base its claim for relief in any respect upon the increased war-time prices or any other emergency conditions. It has properly refrained from trying to inflate present values of its property through presentation of "opinion" estimates of "Cost-to-reproduce-new," based on short-period averages so selected as to bring in a heavy "loading" of war-time costs, but has stood on available figures of actual outlay, whenever made, during the company's operating history. Hence the figure of \$1,033,960.28 may without injustice be taken as a fair as well as sound basis for calculations of return.

ELEMENTS TO BE TAKEN INTO ACCOUNT

In arriving at a fair determination of the issues here presented by the petitioner, there are to be taken into consideration questions as to the legal powers of the Commission, questions as to the principles which properly govern in the fixing of a rate for

the future, questions as to the application of those principles to the facts of this case, and the relationship of the determination thus reached herein to a sound public policy in respect to urban transportation fares.

In support of its petition for approval of an increased fare, the company alleges, in paragraph XXVI of its petition, that with a seven-cent fare it would be enabled "to continue to operate its cars, pay interest on its bonds, make proper reservation for surplus and contingencies, and maintain the standard of equipment and service."

In paragraph XXIX of its petition, the company alleges that: "To avoid a receivership the interest must be met, the earnings must at least provide for operating expenses, taxes, income deductions, contingencies, and proper upkeep. The choice left your petitioner is to be permitted to increase its revenues by increasing its fares, or it must cease operation as it cannot continue much longer to operate the cars at increasing loss. The only available source for such relief is an increase of its fares both in Queens borough, New York city, and Nassau county."

As to the portions of the petitioner's lines outside the city of New York, it may be added, parenthetically, that increased fares have been granted the company by the Public Service Commission for the Second District, for the most part under a system of shortening the zones within which a passenger may ride for five cents.

RIGHTS AND OBLIGATIONS OF A PUBLIC SERVICE CORPORATION

The purpose of a franchise grant by the sovereign State to a corporate creature, for the laying of rails and the running of cars along a public street, is of course the furnishing of a specialized form of transportation to the public—a perfected form of the same public convenience which is afforded by the public highway itself. Rather than itself to undertake the operation of the facilities requisite for the furnishing of the public service of common transportation for hire, the State charters private corporations and gives them rights of use and occupancy of public thorough-

fares. From the nature of the functions entrusted to such creatures of the State and the nature of the rights and franchises under which they gain rights in public thoroughfares, a number of reciprocal rights and obligations, on the part of the public and on the part of the franchise-holding corporations, came into being, and as a matter of modern administrative policy, the interpretation and enforcement of those rights and obligations, in behalf of the companies, their patrons, and the public alike, have been entrusted to the regulative commissions, subject to the safeguard of judicial scrutiny against arbitrary action and against errors of law. *People ex rel. New York and Queens Gas Company v. McCall*, 219 N. Y. 84; — U. S. —.

For example, the prime requisite is that the company shall furnish reasonable, safe and adequate service. From this it follows that the company must provide itself with adequate and suitable equipment and facilities for the continuous and sufficient furnishing of that kind of service, and must keep that equipment and those facilities in a proper condition to enable the fulfillment of that obligation. If the company fails in any of these respects, the Commission may by order require changes and improvements in, or additions to, such service and equipment, or may require suitable provision for its replacement or upkeep. In addition, and to aid these ends, accounts must be kept by the company and periodic reports made, in accordance with Commission requirements, and capitalization may be issued only with the approval of the Commission, for authorized purposes which conserve the corporate properties and keep unimpaired the investment therein. That is, capitalization has limitations, accounts are uniform and obligations are affirmative. On the other hand and by way of compensation for fulfillment of these *quasi* public obligations, the corporation is entitled to have, and is entitled to have the Commission vouchsafe to it, a rate of payment by the company's patrons sufficient to make possible permanency of efficient operation and to yield a reasonable return upon the property value represented by the unimpaired investment, subject only to the qualification, of course, that neither the State nor

the Commission can guarantee that the volume of business becomes or continues such as to yield in all events an adequate operating income. The State, through the Commission, endeavors to see to it that upon the business done by the company, rates reasonable for the service and productive of a reasonable revenue are charged. Otherwise the company must go out of business or rely on the charity of investors. It is obvious that any business to continue must have a revenue that will do more than meet the mere cost of currently running the business. And, I may add, a street railroad, in order to continue in business at all, must derive from some source at least enough money to meet the expenses of operation, and this is true whether the street railroad is privately or publicly owned. If it is privately owned, the revenue, legally sufficient, must come from fares paid by passengers. If the utility is publicly owned, the revenue must come either from fares or taxes. Under any system of ownership and operation which has or can be devised, the cost of rendering the service must be paid wholly by the patrons and rates readjusted on that basis, or partly by the patrons and partly from the public treasury and rates permitted to remain on that basis. Failing to adopt either course means only the impairment of the investment, the depreciation of the property, the wiping out of the investors, and eventual cessation of the service. There is no way of getting something for nothing, over a long period of time.

What are the elements of proper cost that determine the compensation to which a street railroad is entitled? Without reviewing exhaustively more or less familiar ground, it may be said that a public utility company should receive an income sufficient to meet at least these elements:

1. *The Operating Cost:* That is, the actual cost of coal and other materials used in producing and rendering the service, the salaries and wages paid to officers and employees, and other actual costs of furnishing the service. It may be said that in a rate case any item is subject to consideration as to its reasonableness; for example, salaries of officers should be only reasonable in amount, and a public utility is not entitled to claim

inadequacies of revenue where charges of this kind are excessive. On the other hand, the public is interested in the payment of proper wages and compensation to employees of all grades and the observance of proper working conditions and hours. Laws have been passed relating to such subjects. Necessarily, therefore, payments for labor under legal and actual conditions are a part of cost of operation. If wages and cost of materials go up, the public must expect to bear, directly or indirectly, the burden of such advances. Increased wage and material costs must in the long run come from the passenger or the taxpayer, no matter what the system of ownership, control or operation.

2. *The Cost of Maintenance:* Service cannot long continue unless the property necessary to render that service is maintained in a safe and proper condition. The obligation to render reasonable, safe and adequate service connotes proper equipment properly maintained, and the public often suffers now from failure to recognize and require upkeep as a necessary current charge to be met out of revenues before dividends are payable.

3. *The Depreciation of Property:* Even with proper maintenance there must be a fund to insure replacement of the property necessitated by depreciation including obsolescence, and so the preservation unimpaired of the investment represented by the actual outlay of those who have money in the project. The company's earnings must be such as to include an adequate provision for depreciation.

4. *Surplus and Contingencies:* One of the requirements of section 49 of the Public Service Commissions Law is that in determining the "just and reasonable rates" which will allow a fair return, the Commission is to give "due regard to the necessity of making reservation out of income for surplus and contingencies." Some provision is of course necessary in order to enable the meeting of exceptional results of emergencies, perhaps unforeseen; separate reservation becomes necessary only where it appears that there are factors for which no provision has been made otherwise. Too great rigidity and narrowness in such provision would cramp expansion and curtail real efficiency in operation.

5. *Return on Value of Property:* A public service corporation must have a revenue sufficient not only to operate and maintain the property but also to give a reasonable return to those whose invested money remains in the enterprise. This is necessary in order that investors may feel that they can put their money into public service projects and keep their investments therein with fair assurance of its earning power under proper management. Section 49 also provides, with respect to this matter, that the Commission "shall with due regard among other things to a reasonable average return upon the value of the property actually used in the public service determine," etc. Adequate return must find its basis in the first instance in an adequate gross revenue. Yet there are many possible causes for insufficiency in this revenue, just as there are various factors which may operate to prevent a fair return in spite of adequate gross earnings. A territory may be too sparsely settled, and thus the actual and potential business may be insufficient, no matter what the rate. The enterprise may have been wholly unwise. The particular mode of service may not be the most efficient for the territory. The fare may be too low.

Because of its obvious relationship to the matters here under consideration, it may be remarked that the sound basis of law and policy for the inclusion of these elements of cost of service was recognized in the provisions of the dual contracts between the Commission, with the approval of the board of estimate and apportionment, and the Interborough Rapid Transit Company and the Brooklyn Rapid Transit Companies. These contracts provided for the operation of a single system by each company made up in part of lines built by the city and in part of lines either owned or controlled under prior contracts by the companies. Towards a unified system each company contributed its own lines and certain cash contributions and expenditures for equipment, and the city contributed various lines constructed and paid for by the city. As the privately owned lines were previously earning a good return, they insisted upon a guarantee of

such a return virtually as the price for bringing their lines into the dual system. In brief the dual contracts provide for the following deductions:

1. Taxes and other Governmental charges.
2. All operating expenses, exclusive of maintenance.
3. A charge for maintenance, exclusive of depreciation (fixed at 12 per cent).
4. A charge for depreciation (fixed for the first year of operation at 5 per cent in one case and 3 per cent in the other).
5. Payment of the preferential to the company on account of property contributed by it.
6. 6 per cent on the cash contributed by the company towards construction and equipment.
7. A charge on account of interest and sinking fund for cash contributed by the city towards construction.
8. 1 per cent of the revenue into a contingent reserve fund until it reaches 1 per cent of the cost of the construction and equipment.
9. The remainder to be divided equally between the city and the company.

It will be observed that interest and sinking fund requirements on the city's investment is No. 7 in the above classification. This means that if the gross income of the system is not sufficient to take care of the six preceding items and all of No. 7 the city must, from other sources, care for the interest and sinking fund requirements on its investment; that is, from taxation, subject to possible recoupment from future increased earnings of the system.

In this way, the maintenance of a fixed five-cent fare was ensured, despite extensions of service and possible advances or decreases in operating costs. Back of the fare-payer was placed the *tax*-payer, and the five-cent fare was placed on virtually a public-policy basis, with public scrutiny of operating costs, fixed charges, extensions, and the like, and municipal sharing in either the deficits or the profits which the extended system might prove to yield under such a fare. Should the outcome prove to be a

deficit under a five-cent fare, that deficit operates essentially as a charge against municipal funds, unless and until the municipality, the Commission, and the operating companies concur in the decision to put in force an increased rate of fare on rapid transit lines.

With respect to a street railway system not integrated into the city's rapid transit system, however, the defraying of the cost of the service and the making of adequate provision for the future is left to be dealt with as a matter of the fares paid by those who ride upon the lines.

In still another way, however, the municipality is by law given a relationship to, and a degree of responsibility for, any inadequacy of the petitioning street railroad corporation's net revenues. The city of New York is itself responsible for certain very substantial demands upon the company's receipts. When the company sought franchises, the city of New York fixed the franchise terms on which its grant of rights was conditioned. The petitioner's two franchises were granted for a period of twenty-five years, with a right to renewal for an additional twenty-five years upon a fair revaluation of the grant, with the provision that on such revaluation the annual amount to be paid cannot be less than the amount paid during the last year of the first twenty-five years. For the Little Neck-Flushing franchise the company was required to pay \$7,000 in cash and in addition thereto three per cent of its gross receipts during the first five years, five per cent during the next ten years, and six per cent during the last ten years. Such percentages are required to be reckoned up on the company's entire gross receipts within the city lines, and are not to be considered as a tax or deducted from the company's franchise tax. For the Flushing-Whitestone franchise, the company was required to pay \$5,000 in cash and the same percentages of its gross receipts. All of these annual percentage payments of course come from the passengers, go to decrease the corporate income, and tend to decrease the quality of the service the company can afford for the fare paid.

The company also bound itself, as will be later discussed, not to charge more than five cents for a continuous ride from any one point to any other point on its railway within the city limits. Furthermore the franchise provided, in its 8th paragraph, that: "Upon the termination of this original contract, or if the same be renewed, then at the termination of the said renewal term, or upon the termination of the rights hereby granted for any cause, or upon the dissolution of the company before such termination, the tracks and equipments of the company constructed pursuant to this contract within the streets and avenues, shall become the property of the city without cost, and the same may be used or disposed of by the city for any purpose whatsoever, or the same may be leased to any company or individual."

By the terms of the stock and bond orders, referred to hereafter, the value of such property which will revert to the city was found to be \$383,191, and the annual payment into the fund to amortize the investment in property which will so revert was fixed at \$3,036.

All of these franchise terms become a part of the circumstances under which the company operates, borrows money, makes improvements, defrays operating expenses, and endeavors to earn a fair return on its property used in the service. All of these franchise terms have a very vital relation, as will be later commented upon, to the adequacy of income and the sufficiency of present rates. It is, in part, to be able to continue to meet these terms, and other public charges in the nature of taxes, that the company asks for authority to charge an increased rate. A substantial part of any sum taken from passengers by the present or an increased rate finds its way back into the public treasury under the franchise terms, and at least no later than 1959, all the property of the company in public streets becomes outright the property of the city without any payment therefor by the city.

It is under these circumstances that the city authorizes the petitioner to do business in its streets, requires it to keep up these payments of rentals as well as taxes into the public treasury out

of its earnings, confronts it with the necessity of borrowing money (if need be) to keep up its property, and yet says that the fare shall not be increased above the franchise limitation to five cents.

EARNINGS AND EXPENSES

With this preliminary survey of the company's situation, properties, and requirements, we may proceed to ascertain its earnings and prospects. Analysis of the results of operation during the company's existence shows clearly the problems confronting its managers and the energetic efforts which they have made in good faith to surmount and survive increasingly adverse conditions. The road has been economically managed and operated; its expenses per revenue car mile have been continuously the lowest among the various companies operated in the same general territory. From every angle of examination, the expense accounts of the company have continued creditable to those who have had its affairs in charge. For example, the total salaries of its general officers, including counsel, are but \$10,650 per year, and have never exceeded \$11,175. The total expenses for injuries to employees, other persons and property, medical expenses, claim department expenses, and the like, have ranged in recent years from \$1,261.19 in 1917 to \$3,887.80 in 1916.

Yet the business done and the traffic carried by the company has never been sufficient to realize the expectations of its promoters. From 1911 to 1915 the number of passengers carried between points inside the city of New York increased from 1,122,068 to 1,930,245, of which approximately 75,000 increase was between 1914 and 1915. But in 1916, the number dropped 12,000 behind, and in 1917 the total fell to 1,792,707, at a time when operating costs and expenses were steadily mounting.

Some aspects of this lack of traffic may be pointed out. From 1911 down to 1916, the number of passengers carried by the petitioner in New York city increased 71 per cent, but after the initial year, the increase did not exceed 5.15 per cent in any year (1914), and in 1913 it was 1.68 per cent, 4.01 per cent in 1915,

and an actual decrease of .58 per cent in 1916, followed by an even greater decrease in 1917. Outside of the city, the volume of traffic shows only 2.06 per cent increase from the beginning, with actual decreases in every year except 1912, 1914, and 1915.

From 1912 to 1916, the number of car miles within the city dropped from 364,128 to 331,608; there was a decrease of 27,000 from 1915 to 1916. The number of passengers per car mile was 4.37 in 1911, 5.37 in 1915, and 5.78 in 1916; outside New York city, it was only 3.55 in 1916.

In 1912, the company's receipts per mile of road inside the city were \$9,745.02; in 1916; they were \$10,805.31; outside the city, they were \$3,604.11 in 1912 and \$233 less in 1916. The number of passengers per mile of road increased only from 194,900 in 1912 to 216,106 in 1916, inside the city; outside the city, the number fell from 49,874 in 1912 to 47,828 in 1916.

The company's operating history for its entire system is shown in the following table of "income account:"

YEAR ENDING JUNE 30TH	Gross earnings	Cents per car mile	Operating expenses	Cents per car mile	Taxes
1912.....	\$161,441 95	23.24	\$107,614 18	15.50	\$14,045 47
1913.....	158,758 15	25.79	119,566 60	19.42	20,418 62
1914.....	165,933 40	25.39	109,659 76	16.78	17,433 03
1915.....	169,243 60	26.13	105,943 28	16.86	14,699 82
1916.....	166,347 10	27.24	103,337 42	16.92	14,385 66
1917.....	158,361 25	26.66	108,832 43	18.25	11,603 22

YEAR ENDING JUNE 30TH	Cents per car mile	Non-operating revenue	Cents per car mile	Income deductions	Cents per car mile	Surplus or deficit	Cents per car mile
1912.....	2.02	\$525 00	.07	\$18,725 00	2.70	\$21,582 30	3.11
1913.....	3.22	525 00	.08	26,620 00	4.32	D 7,817 07	D 1.19
1914.....	2.67	525 00	.06	31,933 00	4.89	7,432 60	1.14
1915.....	2.26	907 09	.14	46,348 92	7.32	3,211 56	[.50].33
1916.....	2.36	1,179 14	.19	47,770 74	7.82	2,032 42	.33
1917.....	1.95	1,710 68	.28	48,518 68	8.14	D 8,582 40	D 1.49

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Details of the essential results of operation may be shown from the following condensation of one of the exhibits submitted upon the hearing:

	YEAR ENDED JUNE 30TH		
	1915	1916	1917
Miles of track operated.....	37.72	37.72	37.72
Miles of road operated.....	29.46	29.46	29.46
Number of cars operated.....	15	15	15
Revenue car miles.....	647,593	610,504	596,234
Number of transfers collected.....	166,125	159,455	147,191
Number of passengers carried at —			
2½ cents.....	13,520	16,080	16,480
5 cents.....	2,541,852	2,519,800	2,382,826
10 cents.....	337,771	320,838	317,974
15 cents.....	47,129	44,812	39,287
Total number of fare passengers.....	2,940,272	2,901,530	2,756,567
Number of 5-cent fares applicable to New York city.....	1,930,245	1,919,024	1,792,707
Passenger revenue.....	\$168,277 05	\$165,197 60	\$157,243 75
Advertising, etc.....	966 55	1,149 50	1,117 50
Street railway operating revenue.....	\$169,243 60	\$166,347 10	\$158,361 25
Street railway operating expenses.....	\$105,943 28	\$103,337 42	\$108,832 43
Street railway taxes.....	14,659 82	14,385 66	11,603 22
Operating income.....	\$48,640 50	\$48,624 02	\$37,925 60
Non-operating income.....	\$920 01	\$1,179 14	\$1,710 68
Gross income applicable to corporate and leased properties.....	\$49,560 51	\$49,803 16	\$39,636 28
Rent deductions.....	300 00	300 00	300 00
Gross corporate income.....	\$49,260 51	\$49,503 16	\$39,336 28
Interest (\$40,000) and other income deductions.....	46,048 92	47,470 74	48,218 68
Net corporate income.....	\$3,211 59	\$2,032 42	Loss \$8,882 40

This statement has been checked by the Commission's accountants from the company's filed reports and other data, and is correct, except for the negligible item of the inclusion in the taxes assignable to street railway operations in 1915 of \$114.78, representing Federal income taxes assessed against bondholders and assumed by the company. Inasmuch as this item represents a part of the corporation's cost of borrowing, it should be classed as an income deduction.

The petitioner submitted tables showing the increased cost to it of various supplies and materials, as well as the labor cost, which go to make up the operating expense. The company frankly stated,

however, that although it believed that in so far as these price tendencies were normal and likely to persist, they should be taken into account as economic factors, the company did not base its application upon war-time costs or emergency conditions. This basis of application was in accord with what Commissioner Hervey, for the Commission, said in the recent Long Island Railroad Rate Case:

"In the consideration of the record in this case, the Commission has not failed to take into account the disclosed facts, well within common knowledge, showing the extent to which wartime conditions have caused substantial increases in the cost of labor and of many commodities entering into the maintenance and operation of railroad common carriers and other public service corporations, just as into those of ordinary private enterprises. In calculating fair averages of costs and values over a period of years, the economic changes brought by the world war have been taken into account, and the Commission has not indulged in the violent assumption that after the war prices and operating costs will of necessity return soon to before-the-war levels. The Commission passes upon rates for the present and the future, and in endeavoring to form a fair estimate of probabilities, even emergency conditions and their probable influence on price levels must be taken into account.

"The public utility corporations will of course hardly expect to maintain their normal rate of return; they will not ask for aid in shifting to their patrons all the burdens of war costs, at a time when all individuals and businesses are having to assume a share of the Nation's burden; they will not seek to do violence to long-established rate schedules merely by reason of the increased costs and narrowed margin of return brought by emergency conditions both unusual and temporary. In fixing a rate for the future, the Commission is bound to take into account the facts which have been placed in the record, and the rights of the company and the public alike must stand or fall for the time on that basis."

THE COMPANY'S OPERATING INCOME

Reference to the above compilation discloses that after defraying expenses and taxes assignable to street railway operations, the

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street railway revenue left an operating income of \$48,640.50 in 1915, \$48,624.02 in 1916, and only \$37,925.60 in 1917, a decrease due almost wholly to a falling off in traffic. After adding in a small amount of non-operating income (from bank deposits, investments, etc.), the gross income applicable to the corporate and leased properties is found to be only \$39,636.28 in 1917 and approximately \$49,500 in the two previous years. The only rent deduction for property used but not owned is \$300, leaving the gross corporate income for 1917 the sum of \$39,336.28.

Six per cent return on the value of the corporate property would call for a corporate income of \$62,037; 8 per cent would call for \$82,616; \$39,336.28 (in 1917) was in fact less than 4 per cent a year; \$49,803 in 1916 and \$49,560 in 1915 were less than 5 per cent. It is to be noted, too, that the figure of \$39,336 is derived only on the basis of total maintenance charges of but \$25,000 whereas not less than \$50,000 more is fairly required and is within the bounds of what the company is entitled to earn and appropriate for maintenance and replacement purposes. An adequate expenditure for maintenance would thus have wiped out the 1915, 1916 and 1917 corporate incomes.

The fixed charges or income deductions consist of \$40,000 of interest at 5 per cent on \$800,000, face value, of bonds, together with certain charges necessary to amortize the discount at which the bonds were sold, and similar matter, amounting in all to \$46,048.92 in 1915 and \$48,218.68 in 1917. From this it appears that even on the basis of the company's inadequate expenditures for maintenance, the company was able to meet its fixed charges in 1915 and 1916, with a net corporate income of \$3,211.59 and \$2,032.42 respectively, but in 1917, the gross corporate income was \$8,882.40 less than the fixed charges or income deductions, leaving the company nearly \$9,000 in arrears for the fiscal year 1917 in meeting its fixed charges.

From the foregoing it appears clearly that the company's business, both inside and outside of the city limits, is not yielding sufficient operating revenue to meet the needs and requirements of the company. Certain additional revenues will be secured by the

company as a result of the increase in rates in Nassau county, which has been granted by the Public Service Commission for the Second District. Upon the assumption that there will be no reduction in the number of passengers riding during the present fiscal year as compared with those riding during the fiscal year 1917, the company estimates a total increase of \$8,850.63 from the advanced rates in Nassau county. How disappointed the company has been in the disparity between estimated revenue and actual revenue is shown in the following table covering estimates and their realization during the years 1912 to 1917:

YEAR ENDING JUNE 30TH	Revenue per 1911 estimate*	Actual revenue†	Excess of estimated over actual revenue
1912.....	\$189,184 05	\$161,441 95	\$27,742 10
1913.....	283,776 08	158,758 15	125,017 93
1914.....	309,315 00	165,933 40	143,381 60
1915.....	337,153 00	166,243 60	167,909 40
1916.....	367,500 00	166,347 10	201,152 90
1917.....	400,575 00	188,361 25	242,213 75

* Submitted by the company in Case 1398 (3 P. S. C. R. 87).

† From company's Exhibit 40 in Case 2217.

It appears clearly that with the number of passengers commonly carried by the company upon its lines, the present fare of five cents does not yield a fair return upon the value of the property of the company used in the public service within the limits of the city of New York, even as the rates of the company as a whole do not, in view of the number of passengers desiring to patronize the company's lines, yield a fair return upon the total value of the company's property.

The Commission accordingly is of the opinion, and finds as a matter of fact and under the rules of law applicable to rate regulation, that the business done, or which can under any prospective conditions be done, by the company is inadequate to yield sufficient revenue under any rate which can be charged without destruction of the volume of traffic, and that the maximum fare of five cents now charged and chargeable by the company within the city of New York is insufficient to yield reasonable compensa-

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tion for the service rendered and is unjust and unreasonable and less than that authorized by the principles of law which determine the elements of a fair return upon the value of corporate property used in public service. The Commission likewise finds and determines that the just and reasonable fare as the maximum to be charged would be a fare of seven cents for a single continuous ride on the company's lines within the city of New York.

THE SOURCES OF RELIEF

If the company's volume of traffic is too light to yield a sufficient net revenue or fair return under a five-cent rate, from what source or by what means shall the situation be improved? An increase in the five-cent fare is only one possible way of dealing with the situation; there are possible ways of obtaining the elimination of heavy current charges which come out of revenue as a part of operating expenses, and are within the control of municipal and other public authorities. There is also the question whether, in the event that relief is to be sought, wholly or in part, through advance of the rate of fare, this Commission has power to sanction such an advance, in the absence of evidence of the city's waiver or modification of the franchise provision.

THE COMMISSION'S POWER TO PUT IN EFFECT AN INCREASED RATE

In respect to the power of the Commission to put in effect a seven-cent rate on the petitioner's lines within the city of New York, the facts of the case present a legal question of fundamental and far-reaching importance. That this question does not seem to have been decided by controlling authority in this State warrants a careful statement here as to both the facts and the relevant legal principles, to the end that by co-operation between the petitioner, the city of New York, and the Commission, an early adjudication may be had on this issue on which important public rights depend.

In obtaining the "consent" of the city of New York to the con-

struction and operation of its railroads along the streets of one of the constituent boroughs, the petitioner entered into duly executed contracts with the city, under date of February 1, 1909, and April 14, 1909, respectively. Among the terms and conditions of these agreements were the following:

"The rate of fare for any passenger upon said railway *shall not exceed five (5) cents*, and the company shall not charge any passenger *more than five (5) cents* for one continuous ride from any point on said railway, or a line or branch operated in connection therewith, to any point thereof, or of any connecting line or branch thereof, within the limits of the city. * * *

"This grant is also upon the further and express *condition* that the provisions of the Railroad Law, pertinent hereto, shall be *strictly complied with* by the company.

"The company promises, covenants and agrees on its part and behalf to conform to and *abide* by and perform all the terms, conditions and requirements in this contract *fixed* and contained."

Having by these contracts and accompanying resolutions of the board of estimate and apportionment obtained the "consent" of the city of New York, the petitioner made application to this Commission for its "approval" of the exercise of the franchises thus obtained. On June 15, 1909, this Commission granted its approval of the exercise of these franchises, and the company thereupon proceeded to build and operate its lines along public streets, and has thus far observed the covenants as to fare which the city made the condition of granting its consent to occupancy of the streets at all. The question is now presented whether the Commission may put the company in position to charge more than the maximum stipulated in the franchise contracts granted by the city, accepted by the company, and approved by the Commission.

Thus to state the issue might seem to carry an implication of a ready answer adverse to the Commission's powers, but I am convinced that the matter cannot be so easily resolved. Basic questions as to the demarcations between State and municipal powers are involved, and in passing upon issues not at all in point here, courts of various jurisdictions have said in no very exact fashion

many things from which divergent inferences might be drawn as to the proper disposition of the present controversy.

Since 1875, section 18 of article III of the New York State Constitution has contained a fifteenth subdivision, of which a part is as follows: "No law shall authorize the construction or operation of a street railroad except upon the condition that the consent * * * also of the local authorities having control of that portion of a street or highway upon which it is proposed to construct or operate such railroad be first obtained, * * *."

The contracts by which the petitioner bound itself to charge no more than five cents for a single ride were instruments by which the "local authorities" granted their constitutional "consent" to the use of public streets, upon the petitioner's agreement to remain bound by the contract terms and conditions. The question here under consideration, therefore, becomes, in the first instance, one of determination of the scope and effect of the action of the city under the constitutional requirement. Certain constitutional and statutory provisions may well be kept in mind in this analysis, and it becomes necessary to ascertain just what relation, if any, is borne to the constitutional provision and the city's "consent," by the following:

1. *The provisions of Section 1 of Article III of the New York State Constitution:*

Section 1 of the same article on "legislative powers" in which is contained the section and subdivision relating to consents of the local authorities, provides that: "The legislative power of this State shall be vested in the Senate and Assembly."

2. *The provisions of Sections 73 and 74 of the Greater New York Charter:*

Section 73 of the Charter provides in part as follows: "* * * Every grant shall make adequate provision by way of forfeiture of the grant, or otherwise, to secure efficiency of public service at reasonable rates and the maintenance of the property in good condition throughout the full term of the grant."

Section 74, at the time the petitioner obtained its franchise, provided in part as follows: "Before any grant of the franchise or

right to use any street, avenue, waterway, parkway, park, bridge, dock, wharf, highway or public ground or water within or belonging to the city shall be made by the board of estimate and apportionment, the proposed specific grant embodied in the form of a contract with all of the terms and conditions, *including the provisions as to rates, fares and charges*, and together with the form of the resolution or resolutions for the granting of the same, shall be entered in the minutes of the board of estimate and apportionment * * *."

There should also be taken into account in this connection the provision of section 50 of the charter, delegating to the city "power to regulate the use of its streets;" section 1618, that there should be no repeal or amendment of the charter "by implication;" and section 1620, that the charter shall be construed as an act "intended to aid the State in the execution of its duties by providing * * * an adequate scheme of local government for the communities and peoples affected."

3. *The provisions of (then) Section 93 of the Railroad Law:*

The Railroad Law in 1909 provided, by section 93, now section 173, in part as follows: "The consent of the local authorities in any city of the first class must contain the condition that the right, franchise and privilege of using any street * * * shall be sold at public auction * * *. *The local authorities may, in their discretion, make their consent to depend upon any further conditions * * * respecting the application of any provision herein contained as to the carriage of passengers for a single fare * * ** and also respecting any other matter concerning which, in their judgment, further conditions would be for the public interest. Nothing herein contained shall apply to, or affect any grant hereafter made under the provisions of title one, chapter three of chapter three hundred and seventy-eight of the laws of eighteen hundred and ninety-seven and the amendments thereto known as the Greater New York Charter."

4. *The provisions of Section 53 of the Public Service Commissions Law:*

Section 53 of the Public Service Commissions Law prohibits the

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construction or operation of any street railroad, or the exercise of any franchise or right granted by local authorities to any street railroad, without the permission and approval of the Public Service Commission for the proper district, upon the submission to it of the franchise contract embodying the "consent" of the "local authorities" under the Constitution.

5. The provisions of Section 49 of the Public Service Commissions Law:

The pertinent portion of section 49 is as follows: "49. Rates and service to be fixed by the Commission.— 1. Whenever either Commission shall be of opinion, after a hearing had upon its own motion or upon a complaint, * * * by any * * * street railroad corporation subject to its jurisdiction for the transportation of persons * * * within the State, * * * that the maximum rates, fares or charges chargeable by any such common carrier, railroad or street railroad corporation are insufficient to yield reasonable compensation for the service rendered, and are unjust and unreasonable, the Commission shall with due regard among other things to a reasonable average return upon the value of the property actually used in the public service and to the necessity of making reservation out of income for surplus and contingencies, determine the just and reasonable rates, fares and charges to be thereafter observed and in force as the maximum to be charged for the service to be performed, notwithstanding that a higher rate, fare or charge has been heretofore authorized by statute, etc."

6. The provisions of Section 181 of the Railroad Law:

The applicable portion of section 181 (formerly section 101) is as follows: "181. Rate of Fare.— No corporation constructing and operating a railroad under the provisions of this article, * * * shall charge any passenger more than five cents for one continuous ride from any point on its road, * * * within the limits of any incorporated city or village * * *. The Legislature expressly reserves the right to regulate and reduce the rate of fare of any railroad constructed and operated wholly or in part under such chapter or under the provisions of this article; and

the Public Service Commission shall possess the same power, to be exercised as prescribed in the Public Service Commissions Law."

Of the above-quoted excerpt from the present section 181, the last clause was added by chapter 481 of the Laws of 1910, enacting the revised and amended form of the Railroad Law as chapter 49 of the Consolidated Laws. In other respects section 181 parallels section 101 of the statute as it stood at the time the city of New York entered into a franchise contract granting its "consent" to the petitioner.

It is of course the cardinal rule of construction that, if in any reasonable way practicable, all of the legislative expressions on the subject shall be so construed as to be harmonious, consistent, and operative, and that no portion of any statute shall be given such a construction or effect as would repeal or render nugatory any portion of any other, if such a result can reasonably be obviated. Every part of each of these statutes should, if possible, be so construed as to give appropriate meaning and effect to every part of all of these statutes. *People ex rel. Ulster & D. R. R. Co. v. Public Service Commission*, 171 App. Div. 607, 609, 620. Where a conflict may occur between a statute and a constitutional provision, and the statute is reasonably open to an interpretation which avoids the constitutional prohibition and gives effect to the obvious purposes of the organic law, such a construction of the statute will be adopted. *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 408; *United States v. Bennett*, 232 U. S. 303; *Kings County Lighting Co. v. City of New York*, 176 App. Div. 175; *affd.*, 221 N. Y. 20.

Procedure As to Procuring Rights in Public Streets

When the promoters of a street railroad project seek to obtain a valid basis for the construction and operation of their line, they must, in this State, pursue the following course:

(1) They must procure from the sovereign State their incorporation and franchise right as a street railroad corporation,

authorized to run a street railroad between indicated *termini* and through specified streets and ways.

(2) If they wish to lay their tracks and operate their cars along the streets of a city or other municipality, they must obtain from its local authorities due "consent" thereto.

(3) Having obtained this "franchise," they must obtain from the Public Service Commission determination of the public convenience and necessity of the new line over the route proposed, and its approval of the exercise of the franchise therefor.

The State's chartering of a street railroad corporation confers on it no right to proceed along public streets. For such a right, the Constitution (Art. III, § 18) requires the action and "consent" of the "local authorities" of the city, town or village. The legal question under discussion turns upon the nature and effect of this constitutional provision and the action taken under it; and it should be noted at the outset that the present issue is not controlled by decisions as to railroad or street railroad corporations which obtained their local "consent" pursuant to statutory provisions operative prior to the adoption of the constitutional provision in 1875, and is not controlled by decisions relative to a *legislative*, as contrasted with a *constitutional*, requirement of such "consent." Because the present issue has not been passed upon by controlling authority, and because confusion has arisen from failure to keep in mind the contrast between the constitutional requirement and a mere statutory authorization of such local "consent," I feel there may be public advantage in a review of some fundamental aspects and their consequences.

The streets of a city, like the highways which thread the State, do not belong to the city or the Legislature, or to any other branch or unit of government. The city does not own them except in the sense that it holds them in trust for the use of all the people of the State and not as corporate or municipal property. People *ex rel. City of New York v. New York Railways Co.*, 217 N. Y. 310; *Adamson v. Nassau Electric Co.*, 89 Hun 261, 267. Regulation of the use of the streets is a legislative power and function; certain of this sovereign power of the State is vested in the Legis-

lature. The legislative power confided to it the Legislature may exercise directly or delegate to an agent, such as the municipal government or a board or commission created by the Legislature. Municipalities, no less than administrative or *quasi* judicial commissions integrated directly with the State government, are merely part of the machinery employed in carrying out the affairs of the State (Greater N. Y. Charter, § 1618); municipal corporations have only such rights and powers as are conferred upon them by the State, either through legislative action or directly by the people through constitutional provision, and in the absence of constitutional limitation on the legislative power in this respect, the powers granted to a municipality by the State acting through the Legislature may be enlarged or restricted through the same medium, at the will of the Legislature. *Worcester v. Worcester Street Railway Co.*, 196 U. S. 539; *People ex rel. City of New York v. New York Railways Co.*, 217 N. Y. 310. Powers possessed by the Legislature may be delegated by it to a municipality, a commission, or any other creature of the State, for their exercise in the public interest; powers thus delegated may in the same manner be withdrawn or modified; and if the Legislature's agent has, in pursuance of those powers, entered into agreements with corporations or individuals affected by the exercise of those powers, the undoubted weight of authority, under decisions to which I shall presently refer, is that the Legislature as the repository of power may, either directly or through a commission or other agency, modify the terms of any such agreement, at least upon the application, or with the consent, of the corporation or individuals with whom the agreement was made. This rule governs all situations as to which the Constitution has vested the legislative power exclusively in the Legislature.

An essentially different situation arises, however, where, as in New York, the Legislature's power with respect to the use of public streets by a street railroad is restricted by a constitutional requirement, and the legislative power possessed by the municipality to grant, withhold, or fix terms for, its consent to such use is derived, not from the Legislature, but from the Constitution.

Effect of the Constitutional Requirement

Authorization of the use of public streets by a street railroad corporation was recently said by the Court of Appeals to be "one of the prerogatives of sovereignty and derivable only through the action of the Legislature" (217 N. Y. 315), and the court added that "the power of the Legislature in respect to them (the streets) is qualified by the Constitution alone." When the Constitution provides that no street railroad shall be constructed or operated along a public street without the consent of the local authorities of that city or village, the legislative power as to the granting or withholding of that "consent" and as to the fixing of the terms thereof is by the Constitution vested, not in the Legislature, but in the municipality, and the power of the Legislature is to that extent qualified and limited. The Legislature can charter and sanction a street railroad project, but it cannot compel the city to let the company use a public street, cannot prevent the city from fixing terms on which the city will grant its consent, and cannot dictate the city's terms. In these respects, as the cases indicate, the city stands and acts as the Legislature would have had the power to act, but for the constitutional provision.

In *Adamson v. Nassau Electric R. R. Co.*, 89 Hun 261, 266, the General Term for the Second Department said: "That in granting the consents to the defendant companies the mayor and common council were exercising a legislative power is too plain to require argument. The power to grant or withhold consent to the construction of a street railroad does not emanate from the Legislature, but is devolved upon the municipal authorities by the Constitution. (Art. 3, § 18.) The provision of the Constitution is a restriction upon the Legislature and forbids the enactment of any law authorizing the construction or operation of a street railroad, except upon the consent of the local authorities having control of the street or highway upon which it is proposed to construct the road. The power thus given is governmental, and to the extent that it is held and exercised, the local authorities are clothed with sovereignty, and are as independent in its exercise as in any other department of the government, and, in my judg-

ment, the courts can no more inquire into the motives which governed or controlled the lawful exercise of the power than they can inquire into the motives which induce the Governor to give his assent to an act of the State Legislature."

In the Niagara County Special Term of the Supreme Court in 1910, Mr. Justice Pound, now of the Court of Appeals, ruled, as to the right of a railroad corporation to compel a municipality to withdraw objectionable conditions from its proffered "consent" (People ex rel. Frontier Railway Co. v. City of North Tonawanda, 70 Misc. Rep. 91): "A city may refuse to assent to the construction of a railroad in its streets and may, therefore, impose any conditions it thinks proper as conditions precedent to the giving of its assent; and, if the city attaches conditions which the company deem unreasonable, the only remedy of the latter is to refuse to accept the assent." (Syllabus.)

In Detroit Citizens' Street Railway Co. v. Detroit Railway, 171 U. S. 48, where the provision was "that no such company or corporation shall be authorized to construct a railway, under this act, through the streets of any town or city, without the consent of the municipal authorities of such town or city, and under such regulations and upon such terms and conditions as said authorities may from time to time prescribe," the Supreme Court of the United States indicated clearly that the power to prescribe terms and conditions follows from the very requirement of the local consent, saying: "To refer the right to occupy the streets of any town or city to the consent of its local government was natural enough — would have been natural under any constitution not prohibiting it, and the power to prescribe the terms and regulations of the occupation derive very little if any breadth from the expression of it."

The Legislature's Power as to the City's "Consent"

From this and other authorities, I conclude it to be the correct rule that under the constitutional provision, the city is empowered to exercise the legislative power of determining the conditions on which it will grant its consent, if at all. The Legislature may regulate the *procedure* and *manner* of acting upon an application

for the municipality's consent, and it has done this by various sections of the Railroad Law and Greater New York Charter. Probably the constitutional grant of certain power to the city does not prevent the Legislature from requiring that *other* and *further* conditions, not in effect *reducing* or *limiting* the city's power, be imposed by the city. Matter of Thirty-fourth Street Railroad Co., 102 N. Y. 343. The Legislature may still fix the terms of *its* action, but not the terms of the city's action; it cannot substitute the orders of a Commission for the determination of the local authorities. Matter of New York District R. R. Co., 107 N. Y. 42. As was said by Mr. Justice Ingraham in *People ex rel. South Shore Traction Co. v. Willcox*, 133 App. Div. 561: "It is obvious that the Legislature would have no power to dictate to the local authorities the conditions upon which such a consent should be given. That question must be determined by the local authorities, and the condition that they impose must be complied with before the right to construct or operate the road comes into existence. The conditions under which a franchise shall be granted are to be determined by the Legislature. It only can grant the franchise, but it cannot grant a franchise for a street railroad except upon the condition that the consent of the local authorities shall 'be first obtained.' The Legislature is not bound to grant a franchise because the local authorities want it or have consented to it, and it can impose other conditions upon the grant of a franchise or upon its operation after it is granted. The consent of the local authorities, however, is required before a street railroad can be constructed or operated. As was said in *Kittinger v. Buffalo Traction Co.* (160 N. Y. 377): 'The municipal authorities granting this consent derived their power directly from the Constitution * * *. In the exercise of this power, the local municipal authorities are by the Constitution and the statute clothed with sovereignty and, therefore, beyond the direction and control of the courts,' and we may add of the Legislature. (See, also, *Adamson v. Nassau Electric R. R. Co.*, 89 Hun, 261.)"

And under the ruling in *Allegheny City v. Railway Co.*, 159 Penn. 411, 416, quoted with approval by Mr. Justice Pound in

the North Tonawanda Case, *supra*, the city, under the constitutional provision, has power to make its consent depend on the acceptance and observance of any condition which the Legislature could itself have imposed but for the constitutional grant of legislative power *pro tanto* to the city. See page 126 *et seq.*, *post*.

The View of the Third Judicial Department

The New York decision most commonly referred to as adverse to the conclusion reached in this opinion is *People ex rel. New York & North Shore Traction Co. v. Public Service Commission for the Second District*, 175 App. Div. 869, which was filed in the Third Department and was not carried to the Court of Appeals. With all deference, this decision seems plainly to proceed on assumptions unsupported by the authorities. For example, its basic assumption is stated to be, not that section 18 of article III of the Constitution is to be read as a limitation and a restriction on the general legislative power conferred on the Legislature by section 1, or that section 18 delegates certain sovereign power to the city just as section 1 delegates certain powers to the Legislature, but that "manifestly sections 1 and 18 of article III of the Constitution must be read together." This statement evidently led a majority of the learned court to regard section 1 as a limitation upon section 18 of article III, and as qualifying the power granted to the local authorities by section 18 of article III, instead of looking upon section 18 as *pro tanto* a separate grant of autonomous power possessed by the State or as a limitation upon section 1. This inexactness then brought a majority of the court to the fundamentally erroneous conclusion that "the local authorities are *prohibited* from attaching conditions to the consent which assumed to regulate the rate of fare, for the reason that the right to regulate fares to be charged by public service corporations is essentially a legislative function. * * * As well might the Legislature disregard the constitutional rights of the local authorities and itself assume to give the constitutional consent as the local authorities assume the constitutional rights of the Senate and Assembly to legislate regarding the rates of fare * * *. The constitutional

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provision regarding legislating is a restriction upon the local authorities in the matter of attaching conditions fixing rates of fare." From this the court concluded that at least where the *Legislature* had not delegated to the local board the power to exact a fare condition in granting its consent, the Legislature might, through the Commission, advance a rate above the figure the local board and the company had agreed upon.

The Westchester Case in the Court of Appeals

How far the New York and North Shore decision would, even under its own basis of determination, apply to and control a situation where, as in the present case involving the city of New York, the power to prescribe fares in granting "consent" had been conferred on the municipality by express terms of a legislative act, if not also by fair implication from the constitutional grant, I do not think it necessary to discuss here. The primary question is whether the learned court was correct in its assumption that the Constitution prohibits the local authorities from making a fare limitation one of the terms and conditions of the local consent. I think it was not. Of course no validity of agreement could arise from municipal insistence upon a prohibited term, and no public authority could be invoked to enforce a covenant a municipality was prohibited from exacting. Yet in *Public Service Commission v. Westchester St. Railway Co.*, 206 N. Y. 209, 216, where the municipality had made the observance of a five-cent fare a condition of its consent, given pursuant to the very constitutional provision here under consideration, and the company later tried nevertheless to charge more, the Court of Appeals said: "When the village granted appellant's predecessor an extension of its franchise it had the right as a consideration therefor to exact suitable conditions and agreements from the company in the interest of its inhabitants. There is no doubt that the rate of fare to be charged to and from points in the village was a matter of such municipal and public interest that the municipal authorities might bargain with reference thereto. Therefore the grant of the new franchise on the condition and consideration, amongst others, of a five-cent fare

between the points now involved and the acceptance by the company thereof and its agreement to observe all the 'conditions, regulations and restrictions' thereof made a valid contract."

It may be noted in this connection that the Court of Appeals affirmed a summary writ compelling observance of the fare limitation exacted by the municipality, and did this in the face of a plea that the five-cent rate was so low as to be unprofitable and confiscatory, saying, per Hiscock, J., now chief justice: "I am not aware of any principle or authority which compelled the court to refuse to enforce the obligations imposed by the contract involved simply because one of the parties had ill-advisedly agreed to unprofitable terms."

The view indicated by the Court of Appeals cannot be regarded as casual and unintended, and I am constrained to give it effect, rather than the contrary indications of an intermediate appellate tribunal to which the determinations of this Commission do not come. The view indicated by the highest court accords with reiterated judicial rulings and expressions, in this and other States. For example, in the North Tonawanda Case, *supra*, involving a statutory rather than constitutional requirement of assent, Mr. Justice Pound ruled that the company could not accept and avail itself of the city's proffered assent on any basis of treating conditions as to fares and the like as nugatory and ineffectual, and could not ask to have the city's offer of assent on conditions and the company's attempted acceptance on basis of disregarding the conditions "converted into an assent by the court." Mr. Justice Pound added: "If the city gives its unqualified assent, the Public Service Commission may regulate facilities, rates of fare and conditions of service and many other matters; but the Legislature vests in the municipality, in the first instance, power to refuse its assent, and that necessarily implies the power to impose conditions. True, the relator derives its right to cross the streets from the State, but it takes this right subject to the condition of obtaining the assent of the municipality."

In *Willis v. City of Rochester*, 95 Misc. Rep. 686, in the Monroe County Special Term of the Supreme Court in June, 1916.

Mr. Justice Rodenbeck had before him a question whether a limitation of street railroad fares to five cents was "germane to the governmental powers and functions of the city." The case involved the constitutionality of a local act of the Legislature amending the charter of the city of Rochester so as to bring certain adjacent territory within the city limits, and providing that a corporation operating a street surface railroad shall not charge any passenger more than five cents for a continuous ride within the limits of the city as thus enlarged. The act was attacked on the ground that the inclusion of such a limitation on fares violated the constitutional provisions against the combination of matters of general legislation with provisions of private and local bills. The learned court said that "the answer to this question depends upon whether or not the regulation of street railroads, and particularly the fixing of the fares to be charged, comes within the subjects which properly are or may be made a matter of municipal regulation or control. Is the regulation of street railroads so far as a city is concerned 'a matter which may be required for the preservation of peace, good order and health within its limits, the promotion of its growth and prosperity and the raising of revenue for its government?' Louisiana v. Pilsbury, 105 U. S. 278, 289. If their regulation comes within any of these purposes, provisions relating to fares may be included in an act creating a city or one amending its charter generally. It seems to me that upon principle and upon the adjudicated cases the question must be answered in the affirmative." Citing Public Service Commission v. Westchester St. Railway Co., *supra*; Willcox v. Richmond Light and R. R. Co., 142 App. Div. 44; *affd.*, 202 N. Y. 515, and other cases. Mr. Justice Rodenbeck significantly added that "the constitutional consent which the city is required to give to the construction or operation of a street railroad is satisfied in this case by the approval of the act by the local authorities under another provision of the Constitution." His conclusion was that the legislative power had not been exceeded because exercised in a local act confined to matters relating to the city, the establishment of maximum fares on railroads within the city being a municipal purpose.

When the Willis Case went to the Court of Appeals (219 N. Y. 427), an affirmance with but one judge in dissent resulted. The opinion of the court, per Pound, J., held that "The rate of fare is a matter of *municipal* and public interest" and rejected the plea of the confiscatory character of the five-cent rate. This was done, on the authority of the Westchester Case, *supra*, on the very same day the Appellate Division for the Third Department filed its decision in the New York and North Shore Case.

As to the power of a municipality to contract for, and even pledge its credit to secure, the maintenance of a five-cent fare, the decision in *Admiral Realty Co. v. City of New York*, 206 N. Y. 110, is also pertinent.

Fare Provisions of Franchise Contracts as Provisions of "Law"

As bearing upon the assumption of a majority of the members of the Appellate Division for the Third Department that the Constitution prohibits a municipality from undertaking to prescribe maximum fares as a condition of granting the constitutional consent, there is significance in the action of the Appellate Division for the Second Department and the Court of Appeals in *Willcox v. Richmond Light and R. R. Company*, 142 App. Div. 44; *affd.*, 202 N. Y. 515. The predecessor of the defendant company had in 1895 obtained from the board of trustees of the village of New Brighton, S. I., a grant of right which contained a condition that the railroad company "will transport passengers over the entire length of any of its lines of railroad within said village at a rate of fare not exceeding five cents for each continuous trip of each passenger, and will allow to each passenger paying such fare, if requested by such passenger, and subject to reasonable regulations, one transfer from any one to any other of its said lines," etc. It was held by the Appellate Division, with the subsequent affirmance of the Court of Appeals, that the company's non-compliance with this term relative to fares and transfers, constituted not merely a violation of contractual covenant, but even a "*violation of law*," within the meaning of section 57 of the Public Service Commissions Law, and that accordingly a writ of peremptory man-

damus should issue to compel the observance of such conditions. This result was reached largely upon the authority of *Roby v. City of Chicago*, 215 Ill. 604, in which the Illinois court said, relative to an ordinance prescribing the terms and conditions upon which a street railroad company might occupy the streets of Chicago, "the city, in passing such an ordinance, performs a legislative function, and in so doing acts as a governmental agency of the State; and the ordinance, when passed, has the force and effect of a law of the State." It is of course hard to see how violation of a contract term which the Constitution forbade the village trustees from exacting at all could be regarded as "a violation of law" and summarily dealt with as such. If *ultra vires* and constitutionally interdicted, as held by the Third Department, the franchise term could be disregarded with impunity.

In 1888 the General Term of the Supreme Court held in *People ex rel. West Side Railroad v. Barnard*, 48 Hun, 57, that the Common Council of Buffalo had no authority, in granting a local franchise for a street railroad, to prescribe a maximum rate of fare upon such a line. One of the conditions of the grant had been that the company "shall charge no greater than a five-cent fare for one continuous passage" over certain routes indicated in the franchise. The decision of the General Term was reversed by the Court of Appeals (110 N. Y. 548), which held that the common council had a right to impose as a condition to its consent that the purchaser of the franchise should carry passengers for a single fare over the routes indicated, and said:

"Under this act and under the constitutional provisions applicable to the construction of street railways, the municipal authorities have the absolute power to grant or withhold their consent to the construction of street railways; and they may impose any conditions, however onerous and difficult to perform, which seem to them, in the exercise of their discretion, to be proper, as the terms upon which their consent will be given. * * *

"It has been said that the action of the common council was illegal and void because it required the purchaser of the franchise to carry passengers from Seneca street through the route specified

in the grant for a single fare of five cents for one continuous passage. The resolution undoubtedly required the railway company taking the grant to carry passengers to and from points beyond one of its termini. This was a condition which it could impose. It might be difficult for the company taking the grant to perform it; but it was not impossible to perform it because, under the statutes, there was a way by which the relator could obtain the right to run upon the tracks of the East Side Street Railway Company, which owned the road between Seneca street and one terminus of the route granted. If it should turn out that it could not comply with the terms of the grant, in the respect mentioned, the result would simply be that it would be exposed to the forfeiture of its franchises and rights."

In *Gaedeke v. Staten Island Midland Railway Co.*, 43 App. Div. 514; on motion for reargument, 46 id. 219, it was held that the Commissioners of Highways of a town, whose consent to the construction of a railroad on such highway is made necessary by section 91 of the Railroad Law, may, as a condition of granting such consent, properly require the railroad company to execute an agreement to transport passengers for a single five-cent fare between fixed points, one or both of which lie outside the municipality granting the franchise, and to issue transfers to connecting lines. The Appellate Division in the *Gaedeke Case* expressly approved the following trenchant and clearly reasoned expression of the trial court: "A last objection is as to the capacity of the local authorities on their side to be parties to such covenants and obligations. It is true, no doubt, that the municipal authorities and the private corporation could not combine by any agreement to nullify limitations and restrictions already imposed by law in favor of the public. But there is nothing in the law, that I know of, which prevents their agreement upon still greater restrictions and limitations for the public advantage. The statutory provisions have no such purpose or effect. Not more so than they prevent the company from contracting, as already remarked, with a passenger for a lesser fare than the statute might otherwise permit. Take the case of a general railroad which under the statute could charge

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three cents a mile. The statutory provision does not in any way affect the perfect validity of the agreement by the railroad company to charge less. And so of other matters. Such provisions in the statute were intended to make sure that the public interest should be protected at least to the extent prescribed. The local authorities are barred from granting easier terms to the private corporation, but not from obtaining better ones. * * *

"In my opinion all reasonable conditions in favor of the public, thus accepted and agreed upon, which are not repugnant to some positive prohibition of the statutes, are valid and binding. Conditions for common use or common trackage; in regard to transfers between various lines of the same railroad, or lines of other railroads; in regard to the frequency of service; *limitations as to the rate of fare*; limitations as to the time within which the railroad must be constructed — all these tend towards the purpose of the statute and not against it, and they are, in my opinion, reasonable and legal conditions and obligations properly undertaken by the railroad company in its contracts with the municipal authorities.

"Indeed, as I view it, these conditions are lawful and binding, not only as terms stipulated by the covenants on the part of the applicant itself, but as terms which the local authorities could impose of their own motion as conditions of their assent.

"Back of the statute lies the Constitution. The statutory enactments in regard to the local authorities are intended to enforce the constitutional provision which practically prohibits railroads from being constructed and operated on public streets and highways without the consent of the local authorities. It seems a very narrow and niggardly view of the scope and intent of that constitutional provision to treat those authorities almost as dummies who can merely nod their heads yea or nay, without voice as to the precise conditions of the proposed railroad. * * *

"As to the appropriateness of the stipulated covenants, ridicule seems misplaced. A most important consideration in determining whether to give consent or refuse it, is not simply the physical occupation of the streets by the railroad within the town, but what public facilities it will afford both *through and to and from the*

town. In other words, in the largest sense, the public benefit to accrue from yielding the public highways to such a use. What are the questions which naturally present themselves to any intelligent and honest official expressly charged by law with the power to grant or refuse the public consent? What kind of a railroad? Reaching where? *For what fare?* To be built within what time? If such and such, yes. Otherwise, not. Otherwise it will obstruct the public highways to no advantage. It will prevent others. It will prove, not a source of development and convenience, but of obstruction to the growth and interests of the community. These are precisely the considerations provided for in the contracts with these various officials. They seem to me eminently proper and lawful conditions and obligations undertaken by the defendant with the respective local authorities who had by law the power and authority to act in behalf of the public in regard to granting or refusing the public consent."

The Legislature's Power Subsequently to Modify

If, as we have seen, the constitutional provision clothes the city with sovereign legislative powers, in the exercise of which the city has independent policy-determining powers beyond the control of the Legislature or the courts (*Kittinger v. Buffalo Traction Co.*, 160 N. Y. 377; *Adamson v. Nassau Electric R. R. Co.*, 89 Hun, 261); and if the constitutional provision is to be regarded as making secure against legislative interference the right of the city to see to it that no more than an indicated maximum fare is charged upon lines for which it grants consent to the use of its streets, may the company which has obtained the city's consent through agreement to abide by such a limitation be relieved therefrom by legislative action, over the city's objection? I think not. Such a view can proceed only from an assumption that section 1 qualifies and limits section 18 of article III, rather than the reverse. I am of the present opinion that if a municipality has bound a street railroad corporation to charge *no more than* five cents, the Legislature, in the exercise of its general regulative powers, could, itself directly or through a Commission, reduce the fare to four cents or

three, or could exercise its regulatory powers in any manner which did not nullify, defeat or impair the standards of maximums in rates and minimums in service which the city had set up as conditions of its consent. On the other hand, a general legislative act prohibiting a fare in excess of ten cents would not prevent the city from granting its consent on terms prohibiting a charge in excess of five cents. Either the Legislature by a general act or a delegation of power to a Commission or the city by a franchise contract could *reduce* the fare *below a maximum* fixed by the other, but neither could *advance* it above a maximum fixed by the other. "Except for conditions attached to the consent," the rates and service of the company under the franchise remain subject to "regulation under the police power" (People ex rel. City of Olean v. W. N. Y. & P. T. Co., 214 N. Y. 526), but this does not in any way make the *general* legislative power vested by section 1 effective in whittling away the "conditions attached to the consent" of the city, either at the time the consent is being granted or afterwards.

In *Kittinger v. Buffalo Traction Co.*, 160 N. Y. 377, the Court of Appeals, discussing the scope of the local powers under the constitutional provision, approved the ruling of People ex rel. Wakely v. McIntyre, 154 id. 628, that "boards of supervisors, in the exercise of the legislative powers conferred upon them by the Constitution, are not confined in their action to the bare letter of the statute enacted to carry out the constitutional provisions, but may, in the exercise of a sound discretion, act under powers that are fairly to be implied," and added "that to that end each board of supervisors is clothed with the sovereignty of the State and is authorized to legislate as to all details precisely as the Legislature might have done in the premises." The opinion of the court, through Chief Judge Parker, then continued:

"The municipal authorities granting this consent derived their power directly from the Constitution, which forbids the Legislature from enacting any law authorizing the construction or operation of a street railroad except upon condition that the consent of the local authorities having the control of the street or highway upon which it is proposed to construct or operate the road, be first obtained. (Article III, section 18, Constitution.)

“Such was the law at the time of the adoption of this provision of the Constitution, but it had not always been the law. Indeed, in the early history of the State the consent of the local authorities and the property owners to construct street surface railroads in city steets was not required (*Ingersoll v. Nassau Electric Railroad Co.*, 157 N. Y. 453-456), and *apparently for the purpose of putting it beyond the power of the Legislature to deprive the local municipal authorities of a determining voice in the matter, the clause in the Constitution affecting this subject was inserted.* Now the local municipal authorities under the Constitution, as supplemented by the provisions of the Railroad Law, have the power to determine upon what streets, if any, there shall be constructed a surface railroad; to which of two or more corporations, if so many applicants there be, it shall be given; the amount of the bond that may be required for the purpose of protecting the municipality against injury to the streets by their tearing up, and the many other conditions that experience has taught municipal authorities it is wise to impose in order to fully protect the public interests. *In the exercise of this power the local municipal authorities are, by the Constitution and the statute, clothed with sovereignty and, therefore, beyond the direction and control of the courts.*”

Quoting the foregoing from the Kittinger Case, Presiding Justice Ingraham for the Appellate Division of the First Department, significantly continued the last sentence by saying “and we may add, of the Legislature.” *People ex rel. South Shore Traction Co. v. Willcox*, 133 App. Div. 562.

In this connection, of course, cases which arise in the absence of a constitutional provision are not applicable, in so far as they may sustain a legislative or Commission modification of a rate fixed by a local franchise. A distinction as to the Legislature's subsequent powers is clearly to be drawn between a case where the city fixes a fare maximum in the exercise of legislative powers *delegated* to it by the Legislature and a case where the city fixes the fare in the exercise of powers granted to it by the Constitution in limitation on the powers of the Legislature. Where the

Legislature delegates its general powers to the city as its agent, the Legislature may lessen or abrogate those powers, or may abrogate or modify, directly or through another agent (the Commission), what has been done by and through the first agent (the city); and it is elementary law of agency that the latter agent may not be heard to object to such modification or abrogation, *unless* such agent possessed "an agency coupled with an interest." The power which grants may take away or change; the legislative power is supreme. No more than this is held by such cases as *City of Worcester v. Worcester Street Railway Co.*, 196 U. S. 539; *Arlington Board of Survey v. Bay State Railway*, 224 Mass. 463; *New Orleans v. New Orleans Water Works*, 142 U. S. 79; *North Wildwood v. New Jersey Public Utilities Commissioners*, 95 Atl. Repr. 749; *Matter of City Water Company*, P. U. R. 1917 B, 624; *Puget Sound L. & T. Co. v. Reynolds*, 37 Sup. Ct. Repr. 705; *Bay State Railway Rate Case*, P. U. R. 1916 F, 221; *Denver R. R. Co. v. Englewood*, P. U. R. 1916 E, 134, and similar cases.

The Federal decision most commonly cited as supporting the view contended for by this petitioner is *City of Worcester v. Worcester Street Railway Company*, 196 U. S. 539. In fact, the Worcester case is not in point at all. The Massachusetts Constitution contained no requirement of the consent of local authorities to the construction of a street railroad. Under the general laws of the Commonwealth as they existed from 1891 to 1893, it was provided that a street railway company might apply to the board of aldermen of a city, or the selectmen of a town, for the location of the tracks of the railway company in the streets of the city or town, and it was provided that, after hearing, the board might grant the petition "under such restrictions as they deem the interests of the public may require." Mass. Pub. Stat., chap. 113, § 7. Section 32 of the same act made it the duty of every street railway company to keep in repair, to the satisfaction of the superintendent of streets of any such city or town, "the paving, upper-planking or other surface material of the portions of streets, roads and bridges occupied by its tracks," etc. Under the provisions of

the statute, the street railway obtained the privilege of extending the location of its tracks on various streets in Worcester. Subsequently, and in 1898, statutory provision was made for a somewhat different system of taxation than that which prevailed at the time these several extensions of locations were granted and accepted by the railroad company, and different provisions were made with respect to the duty of street railway companies as to paving of streets. The city of Worcester asserted that, inasmuch as the rights of the street railway company in public streets had been granted and accepted under the statute as it stood from 1891 to 1893, the Legislature had no power to substitute different paving and tax regulations in 1898. No provision being contained in the Massachusetts Constitution for the consent of the local authorities, the matter was looked upon by the Supreme Court as solely one for the legislative power of the State and the agency of the city for the State in the exercise of legislative powers. It was consequently held that the Legislature could at any time amend the general laws so as to provide new paving and tax regulations, and that the street railway company was required to obey the amended regulations, rather than those in force at the time it obtained extension privileges from the city authorities.

The Supreme Court said:

"* * * * It may be assumed, for the purpose of argument, that the city of Worcester had power, under the legislation of the State, to grant the right to extend the location of the railroad company's tracks upon the restrictions or conditions already mentioned. It may also be assumed, but only for the purpose of the argument, that the restrictions or conditions contained in the orders or decrees of the board of aldermen, upon their acceptance by the company, became contracts between the city and the company.

"The question then arising is, whether the legislature, in the exercise of its general legislative power, could abrogate the provisions of the contract between the city and the railroad company with the assent of the latter, and provide another and a different method for the paving and repairing of the streets

through which the tracks of the railroad company were laid under the permit of their extended location. We have no doubt that the legislature of the Commonwealth had that power. A municipal corporation is simply a political subdivision of the State, and exists by virtue of the exercise of the power of the State through its legislative department.

" * * * If these restrictions or conditions are to be regarded as a contract, we think the Legislature would have the same right to terminate it, with the consent of the railroad company, that the city itself would have. * * * The Legislature had the right to modify or abrogate the conditions on which the locations in the streets and public ways had been granted, after such conditions had been originally imposed by it."

The decision in *People ex rel. Bridge Operating Co. v. Pub. Serv. Com.*, 153 App. Div. 129, did not involve a franchise contract or local "consent" as to public streets, and so cannot be regarded as applicable here. The question was whether the Commission was empowered to reduce the rate of fare charged by a company operating on a bridge *owned* by the city, below the rate authorized in the company's agreement with the city. The grant of power to the city to make any agreement with the company came from the Legislature, and in no respect from the Constitution. Carefully explaining (pp. 134, 135) that the agreement had previously been construed judicially to have "conferred no franchise upon the Bridge Operating Company, but merely a *license* to operate cars over the bridge," the court held that "as such" it was subject to change as the public interests required and that the legislative grant had accomplished no suspension of the regulative powers of the Commission.

The decision in *Arlington Board of Survey v. Bay State Railway Co.*, 224 Mass. 463, passes upon the power of the Legislature later to alter, directly or through delegation of power to a Commission, fare provisions which had been inserted in a franchise contract pursuant solely to *legislative* authorization. The Massachusetts court held that the sovereign power which granted to one of its agents authority to make a contract with a street railroad

corporation might through another agent waive or modify a term of that contract, despite the objection of the agent through whom the contract was originally perfected.

The case of *Matter of City Water Co. ; City of Sedalia, Intervener*, decided by the Missouri Public Service Commission (P. U. R. 1917 B, 624), cannot be regarded as authority adverse to the present ruling, because it was there held that (syllabus): "The obligation of a valid contract between a city and a public utility is not impaired by a Commission order increasing rates prescribed therein; since the State, by a *legislative* grant of the right to make the contract, does not divest itself of the sovereign power to regulate rates, through the agency of the Commission."

The effect of a *constitutional* grant of power to the city, limiting the legislative power, was not involved or discussed.

As to the legal consequences of a franchise contract containing a fare limitation, made by a municipal council under grant of legislative power, the case of *Detroit v. Detroit Citizens' Street Railway Co.*, 184 U. S. 368, is illuminating. In Michigan, there was no constitutional requirement of local consent, and no constitutional prohibition against the delegation of power to a municipal corporation to contract with a street railway company as to the rate of fare. As has been done in New York (*Greater N. Y. Charter*, §§ 73 and 74; *Railroad Law*, §§ 90, 91), the Michigan Legislature passed a statute which delegated to the municipality any power the Legislature had to make an agreement with a street railroad corporation on the subject of rates. It was contended that "the regulation of rates, fares or tolls upon the street railway is a governmental function, * * * and no matter in what form such delegation of power may be exercised, whether by ordinance or an assumed contract, it is nevertheless a law subject to the alteration, amendment or repeal." The Supreme Court held nevertheless that the municipality having been vested with this legislative power, and agreements having been made and entered into between the city on one side and the companies on the other, relating to rates of fare over a period of time, such agreements could not meanwhile be altered without the consent of both sides.

The Pennsylvania Decisions

Most carefully reasoned opinions upon the subject, as well as most closely in point, are to be found in Pennsylvania, whose constitutional provision is (Penn. Const. of 1874, art. XVII, § 9) that "no street passenger railway shall be constructed within the limits of any city, borough or township without the consent of the local authorities." In *Allegheny City v. Millville A. & S. Ry. Co.*, 159 Penn. 411, it appeared that in 1889, the Pennsylvania Legislature enacted a statute (Act of May 14, 1889; P. L. 217) which repeated the language of the Constitution and then added certain procedural provisions and purported to authorize certain conditions. At the solicitation of the Millville, Etna and Sharpsburg Street Railway Company, the city of Allegheny passed in 1893 an ordinance granting its "consent" to the construction of the road but specifying certain conditions on which the "consent" was granted and might be exercised. One of these terms was that "The rate of fare for carrying a single passenger from the City line to Pittsburg, between the hours of 5 A. M. and midnight, shall not exceed five cents. * * *

The railroad company "accepted" the grant of "consent" and proceeded to build its line. In so "accepting," it contended, however, that the "consent" contained in the first section of the franchise ordinance was a full and complete grant, that the further provision as to maximum fare was unauthorized by law and so of no effect as a condition, and that in consequence no one was bound by it. Authority for this view as to the city's lack of right to insist upon observance of the franchise condition was sought, by reasoning similar to that now urged in New York State, to be derived from the decision of the Pennsylvania Court in *Matter of Pittsburgh's Appeal*, 115 Penn. 4. The case last named involved the People's Natural Gas Company, which acquired its right to lay mains under a comprehensive statute of which one provision was that such a company "shall not enter upon or lay down their pipes or conduits on any street or highway of any borough or city * * * without the assent of the councils of such borough or city by ordinance duly passed or approved." The Pennsylvania

Supreme Court had held that in acting under this provision, the local councils of a borough or city had power either to grant or withhold their consent, but had no power to give it upon conditions not specified in the statute. From this the conclusion was reached that efforts of the Pittsburgh Councils to "legislate on other phases of the general subject" were nugatory and that imposed conditions of assent, not authorized by the statute and never accepted by the gas company, were of no effect.

Under this reasoning a similar ruling was urged in the Allegheny City Case, where, as above quoted, the fare condition had been imposed by a municipality whose consent was a constitutional requirement. The opinion was written by Justice James H. Mitchell, one of the most profound jurists of modern times. Said he: "There is a wide difference between the present case and Pittsburgh's Appeal (115 Pa. 4). The contention there was over the rights of a natural gas company in the streets of the City. As to that subject the legislative control of the streets was complete and the City had only such authority in regard thereto as the legislature chose to allow it."

The constitutional requirement of the city's consent put a different aspect on the matter, said Justice Mitchell. The Legislature's repetition of the constitutional clause and its efforts to authorize specific conditions, neither helped nor hurt the matter, in his opinion. "It neither enlarged nor diminished the constitutional powers of the local authorities," said he, "and may therefore be disregarded. * * * The provision (of the Constitution) under consideration * * * is peremptory and without expressed limitations of any kind. It is a gift directly from the Constitution to the local bodies, and needs no help, nor permits any interference, from the Legislature. If any limitations are to be implied by the courts, the implication must arise from clear necessity, as absolute, as peremptory and as unavoidable as the constitutional mandate itself."

That the municipality had power to exact a fare limitation as condition of its "consent" was clear to the learned jurist: "The man who can give the whole can give part, or who can grant

absolutely can grant with a reservation of rent or other condition. * * * The same principle applies to the present subject."

Justice Mitchell did not believe that the giving of a "consent" under constitutional protection left the Legislature or anybody else in position to "supervise" or to try afterwards to revise or nullify the fair conditions on which the right to use public streets had been obtained from the local authorities. Said he: "It is conceded that the local authorities may impose some conditions, such as those relative to the police power, but where is the grant to any other body to supervise or limit the conditions, or say what they shall be. The Legislature clearly cannot do it. The very purpose of the provision was to put an end to the Legislature's interference. Nor can the courts trespass upon the discretion given absolutely by the Constitution to the local bodies. We do not undertake to say that no condition could possibly be attached to consent, which would be an abuse of or transcend the discretion given. * * * But it would require a very clear case of the contravention of some controlling and paramount principle of public policy, to justify an interference by the courts to put a limit on the unstinted constitutional grant."

Justice Mitchell then proceeded to lay down what I conceive to be the correct rule, viz., that under the *ægis* of the constitutional provision, the local authorities may attach as a condition any provision which the Legislature, acting directly and in the absence of a constitutional requirement as to the action of the local authorities, might itself have made one of the terms of its own authorization or grant of a charter of the company. To the suggestion that "public policy" was contravened by the fare condition, he lucidly replied: "There is nothing of that kind here. There is nothing illegal in the conditions as to the rate of fares, or the taxation of the dividends. The Legislature could have imposed both as conditions to the grant of a charter, or could have delegated that power to the cities as a condition of their consent. If the authority would have been legal on a delegation from the Legislature, *a fortiori* it cannot be illegal on a grant from the Con-

stitution. Neither the constitution nor the legislature has in fact conferred such power on the cities, but the illustration holds good to show that there is nothing in the conditions imposed by the city of Allegheny, intrinsically opposed to the law or to public policy. It is not a question of the municipality's power to regulate fares or tax dividends. There is no contention for that. If the city was assuming such authority as against the railway company, the argument for appellant would be of convincing force. But the city is not doing so. It simply says, 'I have the sole and exclusive power to consent or refuse; I don't compel you to do anything, I merely give you a choice between alternatives; you have no power or right to demand my consent, you ask it, and I give it on my own terms or not at all.' "

Justice Mitchell for the Pennsylvania Court then proceeded to discuss the reasonableness of the fare condition, even were such a "supervision" within the province of court or Legislature. In this connection, he commented with evident reliance upon the New York Court of Appeals decision in *People ex rel. Railway Company v. Barnard* and the statutory requirement now set forth in Section 173 of the Railroad Law as hereinbefore quoted. Justice Mitchell points out in this connection that "the constitutional provision in New York is similar to our own." The opinion continues: "Nor can we see that there is anything unreasonable in these conditions, even if that matter were within our province. A valuable franchise, to use public property, the streets, for corporate profit, is about to be granted. It is not illegal or unreasonable that the public or the city which represents it should have a consideration for the privilege that it confers. If it were a right of passage over private property, there would be no question about it, and the right could not be got in any other way. We see no reason why the public interest should not be promoted by requiring special privileges in the public property to be paid for in the same way. It is matter of general knowledge that the street railways in the city of Baltimore pay part of the fare of every passenger into the city treasury for the development and care of Druid Hill Park, and we learn

from the report of *People ex rel. West Side St. R. Co. v. Barnard*, 110 N. Y. 552, that by an act of 1886 in New York, municipalities are obliged to put up their consent to the construction of street railways within their limits at auction, and award it to 'the bidder who will agree to give the largest percentage per annum of the gross receipts.' The constitutional provision in New York is closely similar to our own. Whether the Legislature could prescribe that the consent of the local authorities in this state could only be given on such condition we express no opinion about, as it is not before us. But it would certainly be no cause of complaint if our own legislators, general or local, should look as closely after the pecuniary interests of the public involved in the grant of franchises. How valuable they may be is illustrated by that case which shows that in the city of Buffalo the successful railway at the auction agreed to pay thirty-six per cent of the gross receipts every year for the privilege.

Summing up the whole matter, and giving manifest weight to the Barnard decision (see page 116, *ante*) under the similar New York constitutional provision, Justice Mitchell concludes: "The conclusion thus reached is so clear upon indisputable principles that it does not require aid from authority, but it is in fact supported by the exactly similar case already cited from 110 N. Y. 552, and by our own decision in *Federal St. R. W. Co. v. City of Allegheny* (14 Pitts. Legal Journal, N. S. 259). In the latter case the city, in 1870, without authority either constitutional or legislative to tax, but under the proviso in the charter of the railway that no street should be occupied without consent, made its consent conditional on the payment of a car tax, and a percentage of the dividends, into the city treasury. The company accepted the ordinance, paid the car tax, but refused to pay the percentage on dividends, upon substantially the same grounds as the appellant relies on here. The court, however, gave judgment against it, saying *inter alia*, "The policy of our legislation has been to make the passenger railway companies pay the municipalities for the use of the streets. * * * It is said the city has no power to impose such conditions when giving

its consent to the use of the streets. * * * The act (charter) gave the company no power to move a stone or lay a rail on any street of the city without the consent of the councils. *The act imposed no restrictions on the city.* The councils could refuse absolutely their consent and the company had no redress.' The proviso of the act of 1878 (in the words of the constitution as to consent of the local authorities), 'is a condition precedent. The power of the municipal authority to give or refuse consent is unlimited and unqualified. That necessarily implies the power to impose reasonable conditions in giving their consent. *If they impose unreasonable conditions all the company can do is to refuse to accept.*' This court affirmed the judgment on the opinion of the Court below. The case is really stronger than the one in hand, because, although the company had accepted the ordinance of consent with its conditions, yet the case having arisen under a charter and ordinance prior to the present constitution, the municipal authority to impose conditions, and their consequent validity, rested only on the powers permitted to it by the Legislature, and not as here on a paramount constitutional grant."

The unanimous decision of the Pennsylvania court thus gave full force and effect to the constitutional provision as affording protection to the terms and conditions of the municipality's consent, and I regard this luminous opinion as of great bearing upon the present issue.

In *Plymouth Township v. Railway*, 168 Penn. 181, the Pennsylvania court, through an opinion written by the same great jurist, followed the rules above quoted, saying, in part: "The learned court below overlooked this constitutional character of the consent of the local authority. * * * If there were the conflict between the conditions of the consent and the statute that the learned Judge supposed, the statute, not the consent, would have to give way."

In *Minersville Borough v. Railway Company*, 205 Penn. 401, the same court ruled that "The power of the borough (under the constitutional provision) to give or refuse consent to the occupa-

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tion of its streets was unqualified, and the power to impose reasonable conditions was necessarily implied." To the same effect is *McKeesport v. Railway Company*, 213 Penn. 544, decided in 1906.

From all of the foregoing, I reach the conclusion that the rule, better supported by reason and by authority, vests the Commission with no power to sanction and put in effect a seven-cent rate on the lines of the petitioner, in the absence of proof of the consenting action of the city authorities. To construe the Public Service Commissions Law to vest this Commission with power to increase above the franchise *maxima* rates fixed by contract between a municipality and a street railroad corporation in the exercise of the constitutional requirement of the city's consent, would be to construe the Public Service Commissions Law to be to that extent unconstitutional. At least any attempted exercise of such a power would be nugatory, as an attempt under color of statute to defeat a right protected by the Constitution. The interpretation that the Public Service Commissions Law was not designed to authorize any such interference with a franchise maximum is at least equally open to the Commission and the courts, and in fact nothing in the language of section 49 denotes an intent to confer power to override a franchise contract. The barrier as to rates "heretofore fixed by *statute*" is taken down, but there is no reference to rates fixed by a franchise contract under the constitutional protection.

Under such circumstances, it is a cardinal concept of construction that an interpretation should be sought and followed, if at all reasonably available, which will preserve and give effect to the constitutional provision, the franchise contract, and the Public Service Commissions Law. An interpretation which would bring section 49 into conflict with article III, section 18, or anything validly done under it, is to be avoided. *Kings County Lighting Co. v. City of New York*, 176 App. Div. 175; *affd.*, 221 N. Y. 20; *United States v. Bennett*, 232 U. S. 303.

The Constitution should hardly be construed so as to enable the Legislature to accomplish indirectly what it could not do directly,

in destroying the effect of the constitutional provision. If article III, section 18, carries a grant of legislative power directly to the municipality from the people and *pro tanto* abridges the general legislative power of the Legislature, can the Legislature undo what it had no power to do or fix the terms of doing? If the Legislature could not forbid the city from exacting a five-cent limitation as condition of the city's consent, may the Legislature, or the Public Service Commission for the Legislature, wipe out that limitation the day after the city's consent and restore a seven or a ten cent fare?

Section 53 of the Public Service Commissions Law may be regarded as expressing and defining how far the Legislature has even *tried* to go in dealing with the terms and conditions on which a city bases its consent. No such franchise contract can be exercised or proceeded under by the company without the approval of the Commission and its determination of the public convenience and necessity thereof. The Public Service Commission can grant or withhold its approval; it can refuse to approve because the city insisted upon a term or condition which defeats the public convenience and necessity (*People ex rel. South Shore Traction Co. v. Willcox*, 133 App. Div. 562; 196 N. Y. 212); but if it finds that public convenience and necessity would be served, it cannot modify the terms of the city's consent or refuse to grant approval merely because it does not like the terms exacted by the city. As was said by Presiding Justice Ingraham in the *South Shore Case*, "it is quite clear that the Legislature did not intend to, *as it could not*, substitute the Public Service Commission for the local authorities" as to the terms of the latter's consent. *Why* couldn't it? *Why "could not"* the Legislature empower the Commission to modify a fare limitation in a franchise contract before approving its exercise? The consent had been granted and the contract signed weeks before the matter was brought before the Commission. If the Legislature *could* empower the Commission to modify the fare provision of the city's "consent," by raising the maximum to seven cents on *the day after* the Commission approved the exercise of the franchise, why "*could not*" the Legislature

empower the Commission to make such a modification of the "consent" before its approval by the Commission?

The view contended for by the petitioner leads to absurd conclusions and would make the law accomplish ridiculous results. For example, that the Legislature could not prevent the city from binding the company to a five-cent rate before letting the company use its streets but could take out the five-cent limitation and authorize a dollar fare the day afterwards; and, likewise, that the Public Service Commission could not modify the five-cent fare clause of the franchise and substitute a higher fare *before* approving it, but could approve it first and then modify it as soon as approved. If, by reason of the constitutional provision, the Legislature "*could not*" authorize the Public Service Commission to modify the fare clause before approving the franchise, I do not believe that the Legislature could authorize the Public Service Commission to modify it afterwards. And if, as the Appellate Division for the Third Department has held, the Constitution prohibits the city from putting a fare provision in its franchise contract, could there be doubt of the Commission's power to refuse to approve such a clause?

It may be pointed out that I have not undertaken to determine in this opinion the question whether or not the street railroad corporation could itself under any circumstances resist the imposition of new or additional regulative requirements by the Legislature, in alteration of the terms of the so-called franchise contract or otherwise. If any such new or further requirements would tend to change or supersede conditions imposed by the municipality, I am by no means persuaded that the railroad company would have any standing to assert that fact, because, if acceptable to the city, such additional requirements would become binding on the company. Although conceivably the city might not, in the absence of specific reservation, possess any power subsequently to modify of its own motion the terms prescribed in its contract with the railroad company, I am clear that the Legislature, directly or through clear delegation of power to a Commission, might promulgate police-power requirements which would

in effect modify the city's prior terms and the city's approval would make such modifications operative.

The reason for this of course is that the State in its sovereign capacity, having complete authority over the use of public highways and streets, is not deprived of that power by anything contained in section 18 of article III. Section 18 is not a limitation on State power, but a defining and circumscribing of the mode of its exercise, so that the Legislature may not seek to utilize that power in such a way as to nullify or alter terms imposed by the municipality in the exercise of its constitutional function respecting that power. In other words, in dictating terms of the franchise contract, the local authorities are, as I see it, constitutionally vested with the exercise of a certain aspect of the State's sovereign power as to streets; but this should not be confused with, or deemed merely a part of, or subtraction as such from, the legislative powers vested in the Legislature by section I of article III. The Constitution clothes the city with an independent legislative power and discretion, a delegation *pro tanto* of the State's sovereign powers. This is very different from saying that the Legislature's powers have been delegated to the city, as is the case where the delegation is by legislative act rather than constitutional grant. The city is by the Constitution made "an independent contractor" with respect to a street railroad corporation's invasion of public streets, and not merely "an agent of the Legislature," as it is probably to be deemed to be when acting under a statutory provision for municipal consent. Consequently, the general powers vested in the Legislature by section 1 of article III are not abridged or curtailed, so far as the *railroad company* is concerned, by any terms or conditions exacted by the city; and the company must be conclusively deemed to have obtained its local franchise contract subject to the general power of the State, without the city's approval, to impose other requirements which do not modify or alter standards exacted by the city, or, with the city's approval, to impose requirements which do alter or modify standards exacted by the city. Within the sphere of its own constitutional functions, under the grant to it of sovereign powers of legislation, the Legis-

lature is left free to regulate the public service corporations chartered by the State under its authority, and if, by such regulation, requirements are imposed in addition to those stipulated by the municipality, it cannot be said that the Legislature has usurped functions or powers of the city, or *vice versa*.

It should perhaps also be emphasized that we are not here dealing with the question of public policy whether the Commission ought or ought not to be vested with the power to advance the rates of this petitioner without the acquiescence of the city whose consent to the use of its streets was obtained only upon the petitioner's solemn agreement never to charge more than five cents. That question of public policy is, or was, a matter for the people to decide, not the Commission. The Commission is powerless to change the Constitution or the law; it can only determine, according to its best judgment, whether those who frame constitutional provisions and enact laws have left the way open for a change of this rate solely through the action of the Commission. In my judgment this has not been done.

THE QUESTION OF THE COMMISSION'S POWER TO INCREASE A RATE ABOVE A MAXIMUM INDICATED BY STATUTE

The further question whether the Legislature has empowered the Commission, under section 49 of the Public Service Commissions Law, to sanction a charge in excess of the five-cent maximum prescribed by the Railroad Law, I shall not discuss at length in this opinion. That question is more particularly involved in a series of cases in course of hearing before the Commission, and more detailed discussion of this phase of the legal question will be deferred until counsel have been heard in those cases.

It may suffice to say at this juncture that I am of the opinion that by the trend of judicial pronouncement which this Commission ought in fairness to follow, there is no statutory barrier to the granting of the seven-cent fare asked for by the petitioner. I am fully aware that the Railroad Law contains a prohibition against a rate of fare in excess of five cents and that section 49 of

the Public Service Commissions Law appears to relieve the Commission's power from the ban of the statutory prohibition only to the extent that the Commission may fix a reasonable rate "notwithstanding that a *higher* rate, fare or charge has been hitherto authorized by statute." I was in Albany frequently during the legislative sessions of 1909 and 1910, and participated in many conferences concerning the revised phrasing of the act of 1910; and I am able to say that beyond peradventure any judicial interpretation of the 1910 amendments which empowers the Commission to fix a rate in excess of the five-cent-fare requirement of the Railroad Law accomplishes a result contrary to what was in the contemplation of either the legislators, the Commission representatives, or even the company representatives, who struggled so patiently with the matter in Albany during that winter. Reference to the minutes of the legislative hearings and other public documents shows this clearly.

At the same time, it cannot be gainsaid that the disposition of the New York courts has been to uphold the view that the Legislature has made the Commission a repository of the legislative power, the Legislature's agent for the expert ascertainment and enforcement of reasonable rate standards, empowered thus to supersede for good cause shown a rate once fixed by the Legislature itself. The tendency has been to look upon the language of the various statutes as warrant for the paramountcy of the Commission's expert findings over *lower or higher* rates fixed casually by the Legislature; except, of course, where the Legislature otherwise specifically directs as to the Commission's *power* over rates, as in the case of gas and electrical corporations. Opinion of Honorable Charles E. Hughes as referee, in Brooklyn Borough Gas Co. v. Public Service Com. for the 1st Dist., N. Y. L. J., June 18, 1917.

At least in the absence of a further clarification of the subject through judicial decision, I am constrained to hold that, aside from the limitation contained in the franchise granted by the city under the constitutional provision, there is no barrier to the Commission's power to sanction the placing in effect of a seven-cent rate;

and I believe that the present case may best be determined on that basis, without prejudice to a fuller consideration of this phase in connection with other cases now being heard. It should be said, of course, that in passing upon the issues of the present case, the Commission has in nowise dealt with the question of its power to sanction an added charge of two cents for transfers, over and above a five-cent fare, on the part of the companies whose franchises from the city contain no conditions as to fares or transfers.

RESPONSIBILITY OF PUBLIC AUTHORITIES

The city of New York, through its corporation counsel, contended that the petitioning company should not be permitted to advance its rate of fare, but did not undertake to show that the company has ever earned a fair return. On the contrary, the city frankly admitted with respect to the petitioner: "Its own evidence clearly shows that from the beginning to the present time it never has made a reasonable return upon the value of its property used in the public service, and from any evidence in the case, it is difficult to conjecture that it never will be able to earn a reasonable return."

Nevertheless, the city took the position of repudiating the venture and seeking to withhold from the company's investors any return upon the actual outlay of money they have put into the public service. The question at issue the able special counsel for the city stated to be "whether every time a public utility is unfortunate or its contemplated earnings fall short of realization, or from local conditions, it is unable to earn a fair return upon property used in the public interest, that it has the right to run to the Public Service Commission and ask for relief by charging the public more for the same service than it had stipulated was the reasonable rate and had theretofore been doing. If a street railroad company has such right, then the Public Service Commission instead of being a body delegated by the Legislature to fix or establish just and reasonable rates or regulations within the limitations of the statutes, is a charitable institution whose chief function is that of

a financial doctor to whom recourse may be had every time there is a financial ill; whether that ill was genitive or acquired."

The matter may not, however, be so readily resolved and dismissed. It should be borne in mind that the public, through the acts of various public authorities, assumed a very definite responsibility for the existence and the activities of this petitioner, and thus came to have a certain responsibility for its continuance as an agency of public service, as well as for the fair treatment of those who, in reliance upon well-considered public certifications, put their money into the project. This continuing public responsibility is evidenced by the terms of the franchise contracts between the city and the company, especially in relation to the reversion of the property to the city, and by the whole record of municipal and State action in relation to the project and the investors therein.

The city had the absolute right, under the constitutional provision, to grant or withhold its consent to the use and occupancy of its streets by the petitioner. It could have kept the company out of New York, but concluded, on the basis of comprehensive reports by its experts, that the public interests would be served by the new line, and so the city admitted the petitioner to a status which the corporation counsel now characterizes as "doomed to failure from the start."

Having thus obtained the city's authorization, the company applied to this Commission for a certificate of public convenience and necessity (Case 1103) under the Railroad Law, and for a certificate of approval (Case 1104) of the exercise of the franchise obtained from the city. The two applications were favorably determined by the Commission (1 P. S. C. R., 1st Dist. N. Y. 614) in June, 1909. With respect to the first, the Commission held, by Commissioner Bassett: "The evidence presented at the hearings showed that the proposed extensions will not parallel any other street surface railroad and will serve a community which is now entirely without street railway transportation. Unquestionably the construction of these extensions is a matter of public convenience and necessity."

With respect to the special franchise granted by the city, Commissioner Bassett perhaps prophetically said, in behalf of his colleagues: "While the franchise contracts granted to this company by the city authorities are subject to objection in certain details relative to jurisdiction in matters of service and equipment and possibly also in regard to the burdens imposed upon the company by the city, I find nothing in these franchises that so vitally endangers the proper development of the transportation system of the city in the future as to justify this Commission in withholding its approval under the circumstances."

Under such sanction, the backers of the project went ahead, and the road was built and placed in operation. Thereafter the company applied to this Commission for approval of the issuance of \$1,500,000 bonds and \$771,764.12 of stock, in addition to \$150,000 already issued (3 P. S. C. R., 1st dist. N. Y. 63 and 205). The application was very exhaustively considered, as it constituted an early opportunity for the Commission to make a thorough study of the proper capital to allow for a newly built road. It also afforded a manifest opportunity to put the affairs and finances of the company at the outset on a basis manifesting the advantages of Commission supervision for the future. The evidentiary method oftentimes of necessity pursued in arriving at a conclusion as to the value of a corporate property was of course not followed in this instance, inasmuch as the vouchers covering construction were in existence and the value could be ascertained from proof of actual outlay, the best proof available under any circumstances. *People ex rel. Kings County Lighting Company v. Willcox*, 156 App. Div. 603. Consequently these figures of outlay were checked and there was found "the actual cost of construction as shown by actual vouchers" (p. 82), with no allowance for contractors' profits, promotion or development expenses. The Commission found such cost to be \$1,600,000 and as a result the company was allowed to issue \$800,000 in bonds and \$907,500 of stock, including the \$150,000 previously issued under authority of the Railroad Commission. Additional stock to the amount of \$81,850 was subsequently allowed for additions and betterments, a total capital

of \$1,789,350, of which all but \$10,000 is outstanding. Commissioner Maltbie, who wrote the very able opinion in the case, examined carefully the question of the relation of the amount of bonds to stock, and said (at p. 86): "The principle that should be applied is clearly that the charges for interest and amortization of discounts upon the bonds authorized should not exceed the amount that will certainly be earned promptly and regularly, after deducting all charges, including reserves for depreciation. It is quite customary for bond houses of standing to go further and require a considerable margin of safety."

Further in respect to the rights of investors to a return on their unimpaired investment in a public utility sanctioned by city and State authority, Commissioner Maltbie said (at p. 89): "As the company has thus far been unable to pay any dividends or interest upon funded debt and as the new bonds that are to be issued will bear interest only from March 1, 1912, it should be clearly stated that the stockholders are fairly entitled to dividends when earned from the dates when the construction period is said to have ended according to the following statement:

Line.	Duration of construction period.	End of construction period.	Cost to that date.
Mineola line, inc., original stock issue.....	9 mos.	Feb. 11, 1908	\$385,000
Hicksville division.....	6 mos.	Mch. 1, 1909	185,000
Flushing division, inc., Whitestone	15 mos.	Nov. 1, 1910	<u>1,030,000."</u>

It is also to be noted that the franchises from the city contained provisions under which the property in the streets should revert to the city at the end of the franchise period of fifty years. Commissioner Maltbie found that the property which would so revert had cost \$350,000 and, therefore, it was provided in the order entered upon the Commission's opinion that proper provision should be made for the amortization of this amount of \$350,000 and also of the \$12,000 paid for the franchise, to the end that at the expiration of the franchise period the property would belong to

the city and the investors would have been repaid for the investment by means of annual charges set aside for the purpose from the revenues. In other words, the basis of financing, by virtue of the terms imposed by the city's grant, was prescribed by the Commission to be that the revenue derived from fares must be and continue sufficient to provide, not only for current expenses, current charges, and a fair return on the property, but also for the municipal ownership of the lines of the company at the end of the period without any actual payment by or from the city. The Commission, therefore, must be regarded as having determined at the start that the company's passengers should be required to pay not only the cost of their transportation but also the cost of acquisition of the lines by the city within the franchise period fixed by the city.

There is, therefore, here, a situation where public authorities, acting under modern theories of carefully prepared franchises and exacting regulations of capitalization, share responsibility with investors for the construction of a street railroad in a territory which it is now proven has not yet come up to expectations, and where, also, the company is asking that it be allowed to increase its fare in the expectation that such increase will augment its revenue. While there can be no certainty as to the latter, it is to be said that the company was allowed by the Public Service Commission for the Second District, New York, to increase its fares outside the city of New York and the result has been increased revenues therefrom. It would, therefore, be fair to expect a similar result here.

The probable development in this territory has of course a bearing on the company's future. The Commission has had under consideration the municipal leasing of the trackage rights of the Long Island Railroad on the Whitestone and Little Neck branches which drain territory in part served by this company. It was the intention to have such trackage rights used by the Interborough Rapid Transit Company as a part of the rapid transit system operated by it under the terms of contract 3, whereby persons in the territory served by the North Shore Company would have been able, with slightly longer walks, to reach other portions of the fourth ward of Queens for five cents, and any portion of the city served by the

Interborough Rapid Transit for ten cents. Such an extension of rapid transit would no doubt have so depleted the potential and prospective number of passengers of the petitioner as to have reduced its revenues below a living point under any rate that could reasonably be fixed. The negotiations for such trackage rights have been suspended, but if they are resumed and successfully concluded, the effect on the North Shore Company is likely to be that here indicated, unless it is absorbed by some larger system or acquired by the city and made a part of the municipal system. Because of the present failure of negotiations, the Commission has announced its intention to extend to Main street, Flushing, its present elevated line, now terminating at Corona. If this is done, the North Shore Company may reasonably hope for an early development of its territory and a large increase in its business, for it will then be in a position to bring passengers to the Flushing terminal, from which passengers can reach all parts of the Interborough's system for five cents. Such a solution of the rapid transit problem in that part of the borough of Queens will put the petitioner on its proper and logical ultimate basis of serving as a "feeder" and "distributor" for rapid transit-lines, and thus may bring an increase in business which will do away with the need for a permanent advance of the fare above the five-cent limitation.

ALTERNATIVE METHODS BY WHICH THE PUBLIC RESPONSIBILITY MAY BE FULFILLED

If the five-cent fare does not afford the petitioner an adequate return under the statute, it does not of necessity follow that the situation must be dealt with by the municipality through its consent to an increase in the rate of fare. Under its present powers, the Commission has no alternative but to certify the need for the advanced rate demanded by the evidence adduced before it; the Commission has no other way of dealing with a street surface railroad corporation open to it. There are a number of courses which the city may follow, rather than condemn to a slow but ignominious extinction the project which it so lately held out as worthy of the confidence of the investing public and as genuinely demanded for

the transportation service of the people of Queens. The company's situation may be dealt with in any one of these ways:

(1) *The city of New York may consent to a waiver or modification of the fare provisions of the franchise contracts, and thus enable the putting into effect of the seven-cent rate which is here found necessary for the continuance of present service under present operating costs.*

(2) *The city and State may to a large extent lessen the company's financial difficulties by remission and repayment of moneys now going into the public treasury out of the company's revenues, by virtue of franchise and statutory provisions.*

(3) *The city may extend to the company the principle and policy of municipalization, already embodied in other aspects of the city's transportation policy — such extension of municipalization to come about through purchase, lease, or acquisition under a municipal guaranty of a fixed return upon unimpaired investment, with a gradual amortization, over a period of years, of this investment out of the earnings, supplemented as need be by contributions from the public treasury.*

1. *As to the city's acquiescence in an advance of rates, despite the company's agreement to remain bound by the franchise maximum.*

As already pointed out, under the constitutional provision and the terms imposed by the city in granting its "consent" thereunder, no advance in the rate beyond five cents can be sanctioned without the city's consent, waiver or modification of the franchise limitation.

The public interests require safe, adequate, frequent service, furnished by rolling stock and equipment of a modern, suitable sort, kept in good repair, and manned with operating men possessing a good grade of ability and experience and paid an adequate wage.

The question whether the present inadequacies of the company's revenue to meet these primary needs shall be met through sanction of an increased fare or in some substitute municipal assumption of the disparity between revenues and requirements, is one for the consideration of the city authorities.

2. *As to the remission or repayment of sums currently or previously taken out of operating receipts to meet payments required by franchise terms or statutory provisions.*

The extent of the demand which franchise taxes, gross earnings, percentages, amortization of investment in property in city streets, and the like, make upon the slender revenues of this company, may be strikingly shown by a table of annual and total payments and reserves, in connection with which should be taken into account the fact that the company's operating income in 1917 was but \$37,925.60 and that an operating revenue of \$62,037 would represent a 6 per cent return upon the present value of the corporate property. From the table it appears that during its seven years of uphill struggle the company has paid over to the city and State, in taxes and percentages, no less than \$111,763.37, and has set aside \$15,676 more to amortize during the fifty-year period the value of the property which will then pass to the city without further payment—a total withdrawal of \$127,439.37 from company revenues. The annual interest at 6 per cent on this sum thus transferred from the company's treasury to the public treasury would be \$7,646.36. In 1917, the company paid out in taxes \$11,798.61 and set aside for amortization \$3,036 more, making \$14,834.61 in all. If left in the corporate income of \$37,925.60, this sum would have made even the low corporate income for 1917 amount to \$52,860, or only \$10,000 short of a 6 per cent return. Of the \$14,834.61, \$4,711.85 was paid over to the city as the required percentage on gross receipts and \$3,036 was set aside as an amortization reserve, thus making a total of \$7,747.85 of annual deductions from corporate income which can be ascribed wholly to the provisions of the city's franchise contracts with the company, and are hence within the present control of the city.

In fact, even aside from these conditions as to direct payments, an analysis of the intricate and burdensome terms exacted of new street railway enterprises by the city, under the somewhat standardized form of local franchise which has been insisted upon by the board of estimate and apportionment for a number of years, would throw much light on the reasons why extensions have been

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few, service has been curtailed, and financial problems have been increasingly urgent. As compared with these municipal requirements, Commission regulation has never been so inflexible and rarely so detailed; the burden of many of these requirements has weighed heavily upon operating revenues.

Thus it appears that the city is itself responsible for an annual drain amounting to nearly 25 per cent of the company's corporate income, that this sum is exacted in addition to all State and local taxes, including franchise taxes amounting to \$1,663.47 more, and that this sum is subtracted from the company's corporate income by virtue of the provisions of the same instrument which stands in the way of advancing the fare above five cents.

The responsibility of the city and State authorities for inadequacies of the corporate income of companies such as this petitioner is thus strikingly manifested. If the city and State wish to require passengers to pay high enough fares to enable the street railroad companies to pay into the public treasury not only real estate, local and school taxes, but also franchise taxes, percentages on gross earnings, and the like, and in addition wish the passengers, within a comparatively short period, to buy for the city and pay for property which the city says must pass soon to city ownership without further payment to the company therefor, the bearings of such a policy should be frankly recognized. What goes into the public treasury as taxes, percentages, relinquished property, and the like, must, under circumstances such as those operative as to this company, come out of the *fare* payer, or must in some other form come again from the *tax* payer. It cannot, over any long period of time, come out of the investors; efforts to leave the investors to bear the burden can only mean deterioration of service, failure to make needed extensions, and eventual receivership. Ought the city to require passengers to pay the cost of early city ownership of all the company's property situated in city streets, and nevertheless leave the company unable to do more than furnish to those passengers grossly inferior service?

If the city does not wish fares to be advanced so as to enable the company to keep up the present rate of payment of percent-

ages, franchise taxes, amortization, and the like, the city might help meet the situation by further modifying the franchise terms so as to obviate this drain on the company's revenues, and might further ask for legislative action dispensing with franchise taxes now payable out of the company's too slender receipts. I do not undertake to say that this should be done; I seek only to point out the situation as to this company and any company in similar straits, and the various ways in which such a situation could be dealt with.

And of course I have not been discussing any situation under which the existing fare yields receipts sufficient to cover all fixed charges and expenses, including these percentages, franchise taxes, amortization reserves and the like, and still enable a fair return on the company's unimpaired investment.

3. *As to the extension of the principle and policy of municipalization as basis for the maintenance of a universal five-cent fare.*

With respect to the rate of fare on rapid transit lines, the city of New York, with the aid of this Commission, long ago fixed its policy and accepted for itself the consequences of that policy. Municipal responsibility for financial consequences has been placed squarely behind the municipal insistence on the maintenance of a five-cent fare. It is perhaps the more pertinent for a member of this Commission to discuss at some length the possibilities as to municipal action in transportation concerns inasmuch as this Commission occupies a relation to municipal policy in such matters which is unique among the many State commissions. This Commission, in addition to the regulatory powers possessed by other Commissions, succeeded to the duties and powers of the board of rapid transit railroad commissioners under the Rapid Transit Act. Under this act, the Public Service Commission as the agent of the city of New York, with the concurrence of the board of estimate and apportionment, grants franchises for rapid transit lines. It may also lay out municipal rapid transit lines, prepare plans, let and supervise construction, make contracts for maintenance and operation by companies organized for the purpose, or, in case of failure to make such contracts, may operate directly such municipi-

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pal rapid transit lines. These powers followed the referendum of 1894, which determined upon the municipalization of rapid transit. A brief review of these powers and the accomplishments thereunder is of value in this connection. In 1900, contract No. 1 was made for the construction, maintenance and operation of a rapid transit system from City Hall northward. In 1907, contract No. 2 was made whereby the system was extended southward from City Hall and under the river to Atlantic avenue, Brooklyn. The operating company, the Interborough Rapid Transit Company, was definitely obligated to pay as rental for the use of such municipal rapid transit lines, an amount sufficient to meet the cost and sinking fund requirements of the bonds issued by the city, thus making such bonds self-sustaining. So far the city has expended about \$50,000,000 on the lines comprised under contracts Nos. 1 and 2. Notwithstanding this substantial addition to the facilities, there was urgent need for great extensions of transportation lines. The principal companies were, however, unwilling or unable to meet the requirements of the situation, and relief therefore depended upon municipal enterprise. The city was, however, under serious debt-limit restrictions. In consequence, on the recommendation of this Commission, a constitutional amendment was passed by the Legislatures of 1908 and 1909, and adopted by vote of the people in 1909, whereby dock and rapid transit bonds of a self-sustaining character might be excluded from computation of the city's indebtedness and the debt incurring capacity thus created used for other dock or rapid transit purposes. As a result, the debt limit was expanded more than \$100,000,000, thus placing the city again in a position to dominate the further development of transportation and maintain the basic policy of a five-cent fare, even for long hauls into outlying boroughs.

Under the dual contracts of 1913, provision was made for the construction, equipment and operation of additional municipal and company lines costing in excess of \$350,000,000. This new system is now approaching completion, and a considerable portion is already in operation. These dual contracts provide not only for construction and operation of new lines, but also for the operation

of the existing elevated lines, as an integral part of the entire system operated by each of the two companies. A fundamental factor in all this has been the continuance of a universal five-cent fare basis for each system. The practical condition that such a fare, when applied to such long distances and undeveloped areas, might not produce a sufficient revenue, was recognized in the financial terms of the contracts referred to heretofore. (See pages 91 and 92, *ante*.) The city thus deliberately undertook the burden of any deficits which might be found to arise from insufficient revenue under a five-cent fare, and obligated itself to meet such deficits by resort to taxation, if necessary.

These contracts are here referred to for the reason that the people of New York city in 1894 by a referendum determined upon the municipalization of transportation and the program thus initiated has progressed until the city now has more than \$200,000,000 invested in transportation facilities. The city thus dominates the transportation field by means of the contracts formulated by the Commission and its predecessor, the rapid transit commission, with the concurrent approval of the city authorities. One of the compelling reasons for entering into the dual contracts, with the obligation to meet from taxation any deficits in operating revenues, was the determination to develop the city, to spread out its population so as to end the congestion which in some places exceeded 3,000 persons to the acre. For it is to be borne in mind that the area of the city is so great that if its population were evenly distributed there could be a plot of land of city lot size for every family. Such a result cannot, of course, be fully realized in actualities, but living conditions can be immeasurably improved if population in congested areas can be scattered throughout the city. This can only be done by additional transportation under a low, uniform fare. There is, therefore, an essentially social problem involved in the transportation facilities and rates for this metropolis.

Just as it is to be said that the city dominates the transportation field within its boundaries, it may also be said that a basic fare of five cents dominates the development and continuation of trans-

portation in that territory, because workers cannot remove their residence to outlying sections unless there is a universal fare at once moderate in amount and fixed beyond prospect of substantial increase. The city, however, must soon face the problems arising from the fact that other corporations engaged in essential services of transportation, particularly if not embraced in and protected by the dual contracts, will continue under the necessity of having such a revenue vouchsafed as will allow them also, in addition to all operating charges and allowances, a reasonable return upon the value of the property used by them for the public service. If this means a cost per passenger in excess of five cents, the public is faced with the alternative of requiring passengers in less congested regions to pay a fare in excess of five cents or of extending the municipalization of responsibility or ownership so that the cost of transportation, if in excess of that which can be met by a five-cent fare ordained by public policy, shall to that extent be borne by the public through taxation. For it is obvious that if a needed service of transportation is to continue it must derive from some source sufficient revenue to meet all costs of transportation, and that this is true whether such transportation is furnished by private ownership and operation, or by municipal ownership and private operation, or by municipal ownership and municipal operation. If private ownership and operation continues, the public must realize that fares must be such as to produce a sufficient income. But, on the other hand, if the fare is to remain constant and uniform, there must be provision whereby increasing costs of transportation shall be met, if need be through further extensions of municipalization.

Such an extension of municipalization may be had by acquisition through purchase, through lease, or through acquisition under a guarantee of a fixed return to the owners with gradual amortization or paying off of their unimpaired investment therein.

AS TO EXTENSION OF MUNICIPALIZATION THROUGH ACQUISITION BY PURCHASE

Acquisition by direct purchase is dependent upon the available constitutional debt margin of the city. Such debt margin may be

expanded only by a reduction of outstanding bonds, by increase in the assessment valuation of real property (an improbable assumption at the present time) or by an amendment to the State Constitution which, even if approved by the Legislature and the people, could not be effective before January 1, 1920. Such an amendment might provide either for an increase in the present 10 per cent debt limit of the city or for the exemption from computation of the city debt of bonds issued for the acquisition of utilities, when the income from such enterprises would be sufficient to make the bonds self-sustaining after caring for all necessary expenses and charges. A precedent exists for such a provision in the constitutional amendment of 1909, already referred to, which provided that self-sustaining bonds issued for dock or rapid transit purposes may be exempted from computation of debt limit and that the debt margin so released may be used only for dock or rapid transit purposes. Under this provision, more than \$100,000,000 of bonds were exempted, and the margin so created cleared the way for the large investment of the city under the dual contracts. The bonds thus enabled for rapid transit purposes may also in turn be exempted from the debt limit as the revenue from the dual contracts reaches the point where it can be devoted to paying fixed charges on such bonds. The margin so created may in turn be used for extensions of the municipal rapid transit system.

A difficulty existing in the acquisition of utilities and having a relation to the debt margin, arises from the fact that the special franchise assessment (and the assessment on all other property of the utility as well) is a part of the total assessment of real property upon which the 10 per cent debt margin is computed. The acquisition of a utility would, therefore, at once reduce the debt margin by 10 per cent of the assessed value of the special franchise and other corporate property, and the more valuable the utility the greater the consequent diminution in the debt margin. The anomaly might, therefore, arise that the acquisition of a valuable and profitable utility would be impossible because by its consummation the debt liability, and so the debt capacity, of the city would be reduced below the constitutional limitation.

It may be said that the Constitution was amended so as to allow the city to issue bonds for its new water supply outside the debt margin and without regard to their self-sustaining capacity, and that the Constitution should similarly be amended so as to allow bonds to be issued without regard to the debt limit or a self-sustaining revenue for acquisition of utilities. Such an amendment would be such a radical expansion of debt capacity as to represent a return to the early days when towns, cities and counties bankrupted themselves in extending credit to railroad development.

Acquisition by purchase might also conceivably be had, by an avoidance of the debt limit situation, through the issuance of securities based on the property acquired and accomplished either by the sale of such securities and payment of the proceeds for the utility or by an exchange of such securities for outstanding securities. This is an untried method and presents difficulties in respect to detail, including the possible unreadiness of security holders to part with their holdings.

AS TO THE EXTENSION OF MUNICIPALIZATION THROUGH LEASE AND OPERATION WITHOUT TAKING OVER OF OWNERSHIP

The leasing and operation of a street railroad property by the municipality would hardly meet the situation unless accompanied by some provision for a guaranteed return upon the unimpaired investment and an amortization plan for the ultimate acquisition of the property by the city. Comment upon these features is reserved for the next heading.

AS TO MUNICIPAL ACQUISITION UNDER A GUARANTEED RETURN TO THE OWNERS AND A GRADUAL AMORTIZATION OR PAYING OFF OF THEIR UNIMPAIRED INVESTMENT IN THE PROJECT

The suggestion of municipal acquisition under a guaranteed return to the investors would not require a constitutional amendment. Proper amendments to existing laws could make possible such a procedure. Precedent likewise exists. Reference had already been made to the fact that in the dual contracts under

existing provisions of the Rapid Transit Act, privately owned lines have been included in the entire system for unified operation, on the basis of a fixed return to the company as a preferential payment from the gross receipts. In connection with the construction of the so-called Ashland place connection under the auspices of this Commission, the suggestion was made, in 1915, that it would ultimately prove necessary to acquire the entire Fulton street elevated. As a method of doing this, it was suggested that "Contract No. 4 provides that the company may deduct from the combined revenue of the city and company lines a liberal allowance covering existing earnings. That contract can readily be amended so as to provide that the company receive an additional one per cent upon a fair valuation of its existing lines to amortize their cost and to provide that the city's right of recap-tion (which would be extended to cover company lines) would be subject to the payment of the portion of that valuation that under the schedules should then be unamortized. Such an arrangement in principle is fair both to the city and to the company and in practice would be advantageous to both. It would not require any present outlay by the city nor any expenditure by the company, except, perhaps, for certain refinancing costs."

This suggestion might serve as basis for legislation extending the possibility of acquisition of other utilities under a guaranteed return with an annual payment out of revenue on account of unimpaired capital value.

Of interest also in this connection is a statement of the way in which the National government has undertaken to meet a situation under which the railroads of the United States were confronted with a demand for a more unified transportation service and an inadequacy of revenue which the government did not feel could be met altogether by an advance in freight rates. The government of the United States assumes direction of operation and its treasury will meet any deficits. The terms of the proclamation of President Wilson, dated December 26, 1917, are pertinent here. The President, after declaring that "under and by virtue of the powers vested in me by the foregoing resolu-

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tions and statute, and by virtue of all other powers thereto me enabling," he thereby, through Newton D. Baker, Secretary of War, took possession and assumed control, at 12 o'clock noon on the 28th day of December, 1917, "of each and every system of transportation and the appurtenances thereof located wholly or in part within the boundaries of the continental United States, and consisting of railroads, and owned or controlled systems of coastwise and inland transportation, engaged in general transportation, whether operated by steam or by electric power, including also terminals, terminal companies and terminal associations, sleeping and parlor cars, private cars and private car lines, elevators, warehouses, telegraph and telephone lines and all other equipment and appurtenances commonly used upon or operated as a part of such rail or combined rail and water systems of transportation, to the end that such systems of transportation be utilized for the transfer and transportation of troops, war material and equipment to the exclusion so far as may be necessary of all other traffic thereon, and that so far as such exclusive use be not necessary or desirable, such systems of transportation be operated and utilized in the performance of such other services as the national interest may require and of the usual and ordinary business and duties of common carriers," continued his proclamation by saying:

"The director shall, as soon as may be after having assumed such possession and control, enter upon negotiations with the several companies looking to agreements for just and reasonable compensation for the possession, use and control of the respective properties on the basis of an annual guaranteed compensation above accruing depreciation and the maintenance of their properties, equivalent, as nearly as may be, to the average of the net operating income thereof for the three-year period ending June 30, 1917, the results of such negotiations to be reported to me for such action as may be appropriate and lawful.

"But nothing herein contained, expressed or implied, or hereafter done or suffered hereunder shall be deemed in any way to impair the rights of the stockholders, bondholders, creditors and

other persons having interests in said systems of transportation or in the profits thereof, to receive just and adequate compensation for the use and control and operation of their property hereby assumed.

"Regular dividends hitherto declared, and maturing interest upon bonds, debentures and other obligations, may be paid in due course; and such regular dividends and interest may continue to be paid until and unless the said director shall from time to time otherwise by general or special orders determine and, subject to the approval of the director, the various carriers may agree upon and arrange for the renewal and extension of maturing obligation."

Provisions of interest and possibly helpful suggestion here are contained in the bill which has been introduced in Congress to carry out the President's plan:

"SECTION 1.—The President, having in a time of war taken over the possession, use and control (called herein Federal control) of certain systems of transportation (called herein carriers), is hereby authorized to agree with and guarantee to any such carrier that during the period of Federal control it shall receive as its just compensation an income at an annual rate equivalent as nearly as may be to its average net railway operating income for the three years ending June 30, 1917 (called herein standard return); said net railway operating income for the purpose of this act shall, as to carriers making returns to the Interstate Commerce Commission, be computed from such returns, excluding, however, debits and credits arising from the accounts called in the monthly returns leased road rents and miscellaneous rents; provided, however, that no Federal taxes in excess of taxes assessed during the year ending June 30, 1917, shall be charged against revenue in computing such standard returns. *Any net railway operating income in excess of such standard return shall be the property of the United States.* The amount of such standard return so accruing during said period of three years shall be determined by the Interstate Commerce Commission, and the certificate of the Commission as to the amount of said net rail-

way operating income shall, for the purpose of such agreement and guaranty, be taken as final and conclusive.

"During the period of such Federal control adequate depreciation and maintenance of the properties of the carriers shall be included as a part of the operating expenses or provided through a reserve fund, in accordance with such principles and rules as shall be determined by the President.

"SECTION 2. —If no such agreement is made the President may nevertheless pay or cause to be paid to any carrier while under Federal control an amount not exceeding 90 per cent of such standard return, remitting such carrier to its legal rights in the court of claims for any balance claimed; and any amount thereafter found due above the amount paid shall bear interest at the rate of 6 per cent per annum; and any excess amount paid hereunder shall be recoverable by the United States with interest at the rate of 6 per cent per annum.

"SECTION 3.—Any claim for just compensation not adjusted as provided in Section 1 shall be submitted to a board of three auditors appointed by the Interstate Commerce Commission. * * *

"SECTION 4.—The return of any such carrier shall be increased by an amount reckoned at a rate per cent to be fixed by the President upon the cost of any additions and improvements made while under Federal control with the approval of the President to the property of any carrier and paid for by such carrier from its own capital or surplus, and by an amount equal to the rate accruing to the United States upon any advances made to such carrier for the cost of such additions and improvements as provided in Section 6 hereof.

"SECTION 5.—No carrier while under Federal control shall, without prior approval of the President, declare or pay any dividend in excess of its regular rate of dividends during the three years ending June 30, 1917; provided, however, that such carriers as have paid no regular dividends or no dividends during such period, may, with the prior approval of the President, pay dividends at such rate as the President may determine.

"SECTION 6.—* * * The President may also, in connec-

tion with the property of any carrier, make or order any carrier to make any additions and improvements necessary or desirable for war purposes or in the public interest. He may from such revolving fund advance to such carrier all or any part of the expense of such additions and improvements so ordered and constructed by such carrier or by the President, such advances to be charged against such carrier and to bear interest at such rate and to be payable on such terms as may be determined by the President, to the end that the United States may be fully reimbursed for any sums so advanced."

IN CONCLUSION

Upon the whole record, I do not think the conclusion can be avoided that the Commission is not at present vested with power to authorize the seven-cent fare which would be warranted by the company's financial circumstances and its right to earn a fair return upon the fair value of its property used in the public service. Only proof of the city's waiver or modification of the fare limitation which it made a condition of its constitutional consent to the use of its streets, could enable an increase in the fare to be accomplished through the Commission's exercise of the power delegated to it by the Legislature. "If," as Justice Pound said in the North Tonawanda Case, *supra*, "the city gives its unqualified consent" so far as fares chargeable are concerned, or if, having once given its consent with fare conditions attached, the city subsequently modifies the franchise contract so as to eliminate or raise the specified maximum as to fares, "the Public Service Commission may regulate * * * rates of fare * * *" and make effective its power to advance the fare above the maximum hitherto specified; but so long as the franchise contract entered into by the company and the city under the authority vested in the city by the Constitution continues to provide that the fare chargeable by the petitioner shall not exceed five cents, no financial extremity of the company can empower the Legislature or the Commission to determine that seven cents may thereafter be legally chargeable.

In the interests of a solution of the matter along such lines as

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the city may deem best in the premises, I recommend that this case be held open for a period of ten days, during which time the company may procure and file proof of action by the city by way of removal of present obstacles to a determination of the matter by the Commission. If during such period of ten days the company has applied to the city for such action, the case should be held open for a reasonable time, pending the city's determination. If the company earlier notifies the Commission that it does not wish to make such an application to the city, I shall recommend that an order be promptly entered herein, denying upon the grounds stated the application of the petitioner.

In the Matter of the Hearing on Motion of the Commission to Take Testimony Relative to Certain Legislation with Respect to Persons, Corporations and Matters within the Jurisdiction of the Commission, and to Determine what Legislation with Respect to Matters within the Jurisdiction of the Commission Should Be Recommended as Deemed Wise or Necessary in the Public Interest

Case No. 2232

(Public Service Commission, First District, January 10, 1918)

Proposed amendment as to the time of filing the annual reports of common carriers, railroad companies and street railway corporations.

Several public service corporations subject to the jurisdiction of the Commission have suggested the advisability of a change in the time stipulated in the Public Service Commissions Law for the filing of the annual reports of such corporations. The constitutional provision as to the authority of the Commission in regard to the matters covered by the suggestion of the said companies is found in subdivision 2 of section 16 of the Public Service Commissions Law. Under that subdivision the Commission is authorized to recommend the enactment of such legislation with respect to any matter within its jurisdiction as it deems wise or necessary in the public interest, and also makes mandatory the holding of a hearing by the Commission, with respect to legislation, when requested so to do by any person or corporation subject to its jurisdiction. At a hearing given by the Commission the draft of a bill was prepared so as to give the Commission power to determine the period to be covered by such annual reports and the time for their filing, and the Commission, after due consideration, decided that it

should acquaint the Legislature with its view that the enactment of the legislation sought would be wise and in the public interest. Recommended that a communication be sent to the Legislature accordingly, together with a desirable form of a bill to effect such purposes.

STRAUS, Chairman.—At the suggestion of a number of public service corporations subject to its jurisdiction, the Commission has given consideration to the advisability of a change in the time stipulated in the Public Service Commissions Law for the filing of the annual reports of the common carriers, railroad corporations, and street railroad corporations. Subdivision 2 of section 16 of the Public Service Commissions Law authorizes each Commission to “recommend the enactment of such legislation with respect to any matter within its jurisdiction as it deems wise or necessary in the public interest.” The same subdivision makes mandatory the conducting of a hearing and the taking of testimony with respect to legislation when the Commission is requested so to do by the Governor, the Legislature, a standing committee of the Legislature, or any person or corporation subject to the jurisdiction of the Commission.

In the exercise of this power and duty imposed by law, the Public Service Commission for the First District decided last August to hold public hearings upon submitted drafts of proposed legislation, and one of the first of these was the outcome of the suggestion of various companies that their accounting conveniences would be greatly served if section 46 of the Public Service Commissions Law were so amended as to conform their fiscal year and the period of their annual report to the calendar year. The plan adopted by the Commission was that any proposed legislation, whether submitted and suggested by any of the interested organizations or companies or formulated by the Commission’s own legal department, should be reduced to a definite draft form, in advance of hearing, and then sent out for the scrutiny, comment, and constructive criticisms of everyone interested, including the corporations affected, the civic bodies ordinarily cooperating in public utility matters, and such organizations as the Bar Associations, the Citizens’ Union, and similar groups of citizens adept in the disinterested formulation and revision of amendatory legis-

lation. General comment and criticism from all available sources was thus invited, and the result of the advance reduction of each measure to concrete form was that most of the discussion which took place on the ensuing hearings was constructive and helpful in its purport. Criticism of the form, phrasing, and substance of each bill was asked for, as well as argument for or against the advisability of recommending to the Legislature the enactment of legislation along some such line. The purpose of the Commission was that its own legislative recommendations might thus have the benefit of extensive scrutiny and criticism from all possible sources, before submission to the Legislature and in fact before the Commission for this district determined whether to recommend such legislation at all. The Commission also sought to afford a convenient forum through which legislation on any subject broached by an interested organization, corporation or individual might be threshed out at public hearings locally held, and perfected to such a form as to minimize criticism and opposition and promote public understanding of its legitimate purposes, in advance of its formal submission to the Legislature. Various corporations in the public utility field found this opportunity of advantage, and cooperated helpfully in the hearings. All drafts of proposed legislation were sent out, in advance of hearings, with the definite statement that they were preliminary and tentative in form and substance, were submitted for comment and criticism only, and were sent out without previous determination by the Commission whether it would finally recommend to the Legislature any legislation on the subject at all. It was of course intended that all data and suggestions developed at these public hearings should be placed at the disposal of the Legislature, at the later opening of its session.

The situation prevailing in the Nation and State, down to the time the hearings were closed by reason of the approach of the legislative session of 1918, was of course unfavorable to undertaking any considerable revisions of statutes or radical changes in organic provisions affecting the functions of the Commissions; but this fact was not deemed, by any who appeared before the

Commission, to discourage the consideration of such measures as would promote general convenience and facilitate legitimate concerns without affecting anything approaching a drastic change. One of the matters which was deemed to come most clearly within this category was the request for such an amendment of section 46 of the Public Service Commissions Law as would enable the filing of the annual reports of common carriers, railroad, and street railroad corporations at such a time as to cover a period identical with the fiscal year. A draft of a bill to this end was formulated by the Commission's law department, and sent out as subject for a public hearing. Only favorable comment and hearty approval were evoked. Among those who approved the bill as drawn and expressed hope that the Commission would recommend its enactment to the Legislature were the representatives of the Interborough Rapid Transit Company, the New York Railways Company, the Third Avenue Railway Company and its constituent companies, the Hudson and Manhattan Railroad Company, the Fifth Avenue Coach Company, and other representatives of corporate and public interests.

Section 46 of the Public Service Commissions Law now contains the following: "The commission shall prescribe the form of such reports, and the character of the information to be contained therein, and may from time to time make such changes and such additions in regard to form and contents thereof as it may deem proper, and on or before June thirtieth in each year shall furnish the blank form for such annual report to every such corporation and person. * * * The annual report required to be filed by a common carrier, railroad or street railroad corporation, shall be so filed on or before the thirtieth day of September in each year."

At the time section 46 of the Public Service Commissions Law was formulated in 1907, the year covered by the annual report of common carriers subject to the jurisdiction of the Interstate Commerce Commission was the twelve months ending June thirtieth in each year, and the obvious intent of the framers of section 46 was to conform the State requirement to the Federal practice.

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The rule of the Interstate Commerce Commission has now been changed so as to adopt the calendar year as the fiscal year, and the Public Service Commission for the Second District has been accepting reports prepared to cover the calendar year, apparently taking the view that the technical requirements of section 46 are met if blank forms are furnished before June thirtieth of each year and the report is filed by the thirtieth day of September following, covering only the *preceding* calendar year. Under the conditions obtaining as to the regulation of public utilities in New York city, such a delay in the filing of the annual report covering a fiscal year would seriously retard and impair the work of the Commission.

In January, 1916, the Association of American Railway Accounting Officers addressed this Commission a communication strongly urging the adoption of the change now contemplated and under all the circumstances I think that such a change in the status is well worth bringing about. The draft of bill considered at the public hearings was prepared so as to give the Commission power to determine the period to be covered by such annual reports and the time for their filing, and I think the Commission may well acquaint the Legislature with its view that the enactment of such legislation would be wise and in the public interest.

I recommend that a communication be sent to the Legislature accordingly. A copy of the desirable form of bill is herewith submitted, marked "Appendix A."

APPENDIX "A"

An act to amend the public service commissions law, in relation to reports of common carriers, railroad corporations, and street railroad corporations.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section forty-six of chapter four hundred and eighty of the laws of nineteen hundred and ten, entitled "An act in relation to public service commissions, constituting chapter forty-

eight of the consolidated laws," is hereby amended to read as follows:

§ 46. *Reports of common carriers, railroad corporations and street railroad corporations.* (1) Every common carrier, railroad corporation and street railroad corporation shall file an annual report with the commission verified by the oath of the president, treasurer, general manager or receiver, if any, of such corporation, or by the person required to file the same. The verification shall be made by said official holding office at the time of the filing of the said report, and if not made upon the knowledge of the person verifying the same shall set forth the sources of his information and the grounds of his belief as to any matters not stated to be verified upon his knowledge. The commission shall prescribe the form of such reports and the character of the information to be contained therein, and may from time to time make such changes and such additions in regard to form and contents thereof as it may deem proper, and [on or before June thirtieth in each year] *not less than three months before the date prescribed by the commission as to the date on which the annual report of such corporation for that year shall be filed*, shall furnish a blank form for such annual reports to every such corporation and person. *Said reports shall cover the period, and be filed at the time, prescribed by the commission.* The contents of such report and the form thereof shall conform in the case of railroad corporations as nearly as may be to that required of common carriers under the provisions of the act of congress entitled "An act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, and the acts amendatory thereof and supplementary thereto. The commission may require such report to contain information in relation to rates or regulations concerning fares or freights, agreements or contracts affecting the same, so far as such rates or regulations pertain to transportation within the state. When the report of any such corporation or person is defective, or believed to be erroneous, the commission shall notify the corporation or person to amend the same within a time prescribed by the commission. The originals of the reports, subscribed and sworn to as prescribed by law, shall be preserved

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in the office of the commission. The commission may also require such corporation and persons to file periodic reports in the form, covering the period and at the time prescribed by the commission. The commission may require of any such corporation or person specific answers to questions upon which the commission may need information. [The annual report required to be filed by a common carrier, railroad or street railroad corporation shall be so filed on or before the thirtieth day of September in each year.] The commission may extend the time for making and filing such report for a period not exceeding sixty days. If such corporation or person shall fail to make and file the annual report within the time [above specified] *prescribed* or within the time as extended by the commission, or shall fail to amend such report within such reasonable time as may be prescribed by the commission, or shall fail to make specific answer to any question, or shall fail to make the periodic reports when required by the commission as herein provided, within the time and in the form prescribed by the commission for the making and filing of any such report or answer, such corporation or person shall forfeit to the state the sum of one hundred dollars for each and every day it shall continue to be in default with respect to such annual report, amendment, answer or periodic report. Such forfeiture shall be recovered in an action brought by the commission in the name of the people of the state of New York. The amount recovered in any such action shall be paid into the state treasury and credited to the general fund. Any railroad corporation or common carrier other than a street railroad corporation operating partly within the second district and partly within the first district shall report to the commission of the second district; but the commission of the first district may, upon reasonable notice, require a special report from such railroad corporation or common carrier. Any street railroad corporation operating partly within the first district and partly within the second district shall report to the commission of the first district; but the commission of the second district may, upon reasonable notice, require a special report from such street railroad corporation.

§ 2. This act shall take effect immediately.

In the Matter of the Complaint of UDO M. FLEISCHMAN against
THE NEW YORK EDISON COMPANY in Regard to its Charges
for Sub-Meters and Electric Current Consumed

Case No. 2228

(Public Service Commission, First District, January 23, 1918)

Charges for sub-meters and electric current by the New York Edison Company.

Premises Nos. 1960-1966 Broadway, 138-146 Columbus avenue, in the city of New York, are owned by the complainant, Udo M. Fleischman, some of whose tenants had contracts with the New York Edison Company for the supplying of electric current. Other tenants purchased their current from the complainant, who in turn paid the Edison Company therefor. There were also in use certain meters owned by the United Electric Light and Power Company in addition to those of the Edison Company. The United Electric Light and Power Company meters were used to measure current furnished by that company. The current so consumed was billed by the Edison Company as a part of its own service under what is known as "exchange service." The practice of sub-metering has been condemned by the Commission in several cases cited in the opinion. To conform to the order of the Commission made as a result of the cases cited the New York Edison Company issued a supplement to its schedule, establishing a schedule of prices. The complainant entered into a meter purchase agreement on the basis outlined in the said supplement. The present proceeding is to establish the amount of the charge which should be exacted and collected from the complainant for sub-meters and for reparation for past excessive charges and payments. *Held*, that the Edison Company should now arrange to transfer the sub-meters to the complainant at the price which the Edison Company would pay the United Company for such meters and that, whatever the price may be that it must pay the United Company therefor, its failure to procure such meters from the United Company while the schedule was effective should not increase the cost of the meters to the complainant; also, *held*, that the Commission has no statutory power to order a refund because of excessive or improper past charges for current actually paid for.

HERVEY, Commissioner.—The facts established upon the hearing in this matter may be summarized as follows:

The complainant is the owner of the premises Nos. 1960-1966 Broadway, 138-146 Columbus avenue. In November, 1915,

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some of his tenants had contracts with the New York Edison Company for the supply of electric current and were billed directly by the company. Other tenants purchased their current from the complainant and the latter in turn paid the Edison Company therefor. The company read the meters of the tenants who purchased their current from complainant, and furnished to complainant itemized bills showing the readings of their individual meters.

In addition to the meters belonging to the Edison Company there were in use certain meters which were the property of the United Electric Light and Power Company and were used to measure current furnished by the latter company. The current so consumed was billed by the Edison Company as a part of its own service under what is known as "exchange service."

The practice of sub-metering then prevailing was condemned by the Commission in *Stadtlander v. New York Edison Company*, 6 P. S. C. Reports, 1st Dist. N. Y. 48, and on October 15, 1915, in *Matter of the Hearing as to Rate Schedules of the company*, 6 P. S. C. R. 1st Dist. N. Y. 289, an order was made directing that on and after January 1, 1916, the company should determine the amount of current supplied to each customer by means of a master meter and that the company should not install more than one meter to a service under each contract. The order also directed that the company's schedule should contain in full the terms under which the company would sell any meters owned or installed by it. The order in no way affected the service to those tenants of complainant who were being served and billed by the company direct.

As a result of the Commission's order, the New York Edison Company issued a supplement to its schedule effective November 20, 1915, as follows:

"Prices of Meters:

"Prices at which the meters now installed upon the premises of the consumer may be purchased by the consumer with the understanding that, if subsequently sub-metering is no longer required, the meters so purchased may be returned within a

period of six months, from January 1, 1916, and if in acceptable condition, the full amount paid for them will be refunded.

“(Here follows a schedule of prices.)”

On December 27, 1915, the complainant signed and sent to the company a meter purchase agreement. No further steps were taken until January 27, 1916, when the company received a request from complainant that until further notice it honor all orders in reference to electric service lamps, etc., from the complainant's agent, the Independent Electric Lighting Corporation. On the same day the complainant's agent notified the company by letter that the complainant would refuse to permit the use of risers or mains in the premises for the sale of electricity to any of the complainant's tenants and a demand was made that a master meter be installed to correctly measure the amount of consumption. A demand was also made in said letter that all sub-meters be connected to the master meters including meters of tenants who were then being served by the company direct, and the complainant also agreed therein to purchase all sub-meters in the premises at the schedule prices. On the same day a further letter was sent to the company by the complainant's agent advising the company that complainant would be compelled to refuse payment of the bills for current supplied where readings on series meters were being made and insisted on being billed for all current furnished in the building and also for sub-meters and meters which were then being used to serve tenants direct. Despite this notice the company in fact continued thereafter to use the risers and meters in the building to serve some of the tenants of the complainant direct and the complainant continued to pay bills made out to him in which was included current consumed by the other tenants through meters not connected with a master meter. This continued until April 28, 1916, when a master meter was installed to which were connected the meters of some only of the complainant's tenants.

Thereafter, from time to time, as consents were received from tenants who were being served direct, their meters were connected to the master meter. The consents of all tenants had not

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been obtained and all meters had not been so connected on July 6, 1916, on which date the schedule of prices for meters which had become effective on November 20, 1915, was superseded by a supplement which provided: "The company reserves the right to sell or withhold the sale of meters belonging to it installed upon the premises of the consumer. In the event of sale the price will be a matter of mutual agreement based on the estimated value of the meter and connected appliances." Although the master meter was installed in April, 1916, the company's seal was not removed from at least one sub-meter until many months thereafter.

The complainant in this proceeding seeks the following relief:

(1) That the Edison Company be directed to charge the complainant at the schedule prices prevailing prior to July 6, 1916, for all meters on the premises in January, 1916, whether the current consumed through the meters was billed to the complainant or directly to the tenant and irrespective of the fact that some of the meters were owned by the United Electric Light and Power Company.

(2) That the company make reparation to the complainant for the difference in the price of the current consumed through the master meter and the aggregate of current consumed through the several sub-meters up to the time of the removal of the seals by the Edison Company.

The company concedes that the complainant is entitled to purchase at the prices set forth in the schedule of November 20, 1915, all meters on the premises owned by it, the consumption through which was billed to the complainant prior to the change of price effected by the schedule of July 6, 1916. As to the meters of the United Company, it was conceded: "The meters belonging to the United Company which in that period he desired to purchase would be charged for at the price which the Edison Company would pay the United Company for those meters."

As to the first prayer for relief—that is, the charge which should be exacted and collected from the complainant for sub-meters—I am of the opinion that the complainant is entitled to purchase at the prices set forth in the schedule of November 20,

1915, only those meters of the New York Edison Company on the premises the consumption through which was billed to him prior to July 6, 1916. The purpose of the order of the Commission and the schedule filed in pursuance thereof on November 20, 1915, permitting the purchase of meters, was to aid a readjustment following the abolition of the practices then existing and was intended to permit landlords to purchase and attach to master meters those meters which had been installed for individual tenants who paid their landlords for current consumed but which were being read by the company. The order and schedule were not intended to interfere with contracts existing between the company and tenants direct and neither were the meters through which such service was being given within the purview of the order and schedule unless the tenants agreed to take current from their landlords. I do not think that the fact that the complainant notified the company that the use of the risers and mains would be no longer permitted is controlling on the question. The schedules of the Edison Company at that time and from August 15, 1912, provided for the following standard contract rider: "It is further understood and agreed that this contract shall not become effective for the service of any tenant or tenants, until such tenant or tenants shall have terminated any existing service contract with the New York Edison Company." Irrespective of this provision, the fact is that the relationship between the Edison Company and the tenants to whom service was continued even after the notice was not thereby terminated, current being furnished to them directly for which they paid the Edison Company.

It appears that the United Electric Light and Power Company provided in the supplement to its schedule effective November 22, 1915, and in all supplement schedules to March 3, 1917, that integrating recording watt-hour meters would be sold for sub-metering purposes at eight dollars each. As the Edison Company undertook with the consent of the United Company to supply the complainant with the current of the United Company on exchange service, the Edison Company upon complainant's demand of January 27, 1915, should have complied with its own rate schedule

and should have procured from the United Company at the schedule prices all meters of the type specified, the consumption through which was billed to complainant prior to March 3, 1917. This was the price "which the Edison Company would pay the United Company for those meters." The Edison Company should now arrange to transfer such meters to the complainant at that price, whatever the price may be that it must now pay the United Company therefor. Its failure to procure such meters from the United while the schedule was effective should not increase the cost of the meters to the complainant.

As to the second prayer for relief — that is, reparation for past excessive charges and payments — it has been pointed out on numerous occasions that the Commission has no statutory power to order a refund or reparation because of excessive or improper past charges for current consumed and paid for, and, therefore, the Commission cannot make an award to complainant because of the company's failure to remove the seals from the sub-meters after the installation of a master meter even if complainant were otherwise entitled to such relief. Irrespective of this, the evidence is not clear as to when title to the meters passed nor whether the seals remained upon more than one of the sub-meters, nor is there any proof that the difference in consumption registered by the master meter and the aggregate of the consumption registered by the sub-meters for the entire period was due to defective sub-meters which the complainant claims could not be inspected because of the presence of the seal. This difference may have been caused by any of these causes: A drop in potential; the consumption of energy required to operate sub-meters and recorded solely on the master meter; or by inaccuracy of the sub-meters. However, for the adjudication and recovery of any damages by reason of past overpayments, the complainant is relegated to a forum of competent jurisdiction.

The parties should without formal order carry into effect promptly the conclusions herein set forth and advise the Commission within thirty days whether this has been accomplished. The necessity of an order in the matter will then be determined.

In the Matter of the Complaint of SAMUEL EVANS MAIRES et al.
against THE FLATBUSH GAS COMPANY Relative to Rates for
Electricity in the Borough of Brooklyn

Case No. 1541

(Public Service Commission, First District, February 1, 1918)

Legislative intent as to the uniformity of maximum rates in the twenty-ninth ward of Brooklyn and the other wards of that borough.

Rates for electricity to be sold in Brooklyn by the Flatbush Gas Company and investigation as to whether the same are unjust, unreasonable and excessive as charged.

Unjust discrimination in price of current sold against the smaller consumers and undue preference to larger consumers—resume of the history as to the electric service in Brooklyn specifically given.

Principles upon which the basis of a true "fair value" is to be found.

Decision made not merely on an arbitrary rate per kilowatt hour but after the consideration and analysis of the rate reduction and its probable effect upon the finances, earnings and corporate income of the company.

In the borough of Brooklyn, city of New York, electricity for general consumption is furnished by two companies, the Flatbush Gas Company, defendant in the present action, which operates in the twenty-ninth ward, known as the "Flatbush section" of Brooklyn, and the Edison Electric Illuminating Company of Brooklyn, which operates in the other thirty-one wards of the borough but has not yet furnished service in its franchise area in the twenty-ninth ward. This latter company has several transmission lines, however, running through the ward in question from which its residents could be supplied with service. The "Flatbush section" of Brooklyn is one of the finest residential regions in Greater New York and is closely built up with homes using large quantities of electric current. Under the statute fixing electric service within the city of Greater New York the twenty-ninth ward of Brooklyn was dealt with the same as the other wards in Brooklyn, and a maximum rate of twelve cents per kilowatt hour for purposes other than street lighting was prescribed alike for the district served by the Flatbush Gas Company and for the remaining section of Brooklyn served by the Edison Electric Illuminating Company of Brooklyn. Laws of 1906, chaps. 732, 733. The legislative intent evidently was that the twenty-ninth ward should be governed by the same maximum rate as the other wards of Brooklyn.

On June 10, 1912, separate complaints signed by more than one hundred consumers were made to this Commission against each of the com-

panies, identical in allegations and prayer except for the designation of the defendant. The allegations of those complaints pertinent to the present discussion are that the prices of electricity sold and delivered in the borough of Brooklyn by the Flatbush Gas Company under its general rate of twelve cents or its proposed rate of eleven cents, are unjust, unreasonable and excessive and disproportionate to the proper cost of manufacturing and delivering such electricity in said borough; also that the differences in price of electricity so sold and delivered under the general rate and the prices charged to numerous preferred customers are unreasonable, and such differences unjustly discriminate against the smaller consumers and give undue preference to the larger consumers.

On July 16, 1912, contemporaneous but separate proceedings were taken before the Commission; one in case No. 1540, in which the Edison Electric Illuminating Company of Brooklyn was the respondent, and the other in the present case, No. 1541, in which the Flatbush Gas Company was the respondent. The latter company supplies both gas and electricity in this region but the proceeding related only to its electrical department. That company asked that the hearing be adjourned for all purposes until after the hearing and decision of the case of the Brooklyn Edison Company. Just before the commencement of the proceeding in case No. 1540 the Brooklyn Edison Company reduced its maximum rate from twelve cents to eleven cents per kilowatt hour. An opinion in the Brooklyn Edison case was handed down on October 27, 1916, accompanied by an order fixing the maximum price at eight cents per kilowatt hour. This was modified by a supplemental order of December 27, 1916, under which a lighting rate of five to eight cents per hour average daily use of maximum demand and a power rate of three to eight cents per hour average daily use of maximum demand were to be established. In the present proceeding it is alleged by the complainant that the prices at which electricity is sold and delivered by the Flatbush Gas Company under its general rate of twelve cents per kilowatt hour are unjust, unreasonable and excessive by reason of the disproportionate relation of those rates to the cost of the service, the return they allow on the corporate property and their excess over the fair value of the service rendered as attested by the rates chargeable by the Edison Company in the same territory, and also that the differences in the prices charged various consumers of such electricity are unreasonable, unjustly discriminatory and unduly preferential.

Rates demanded by an electrical corporation for electricity or any service rendered must be reasonable and just. The meaning of the expressions "present value" and "actual cost" has been considered in other jurisdictions. The results of such investigation are herein set forth.

Held, that the Commission might find warrant, from the facts indicated in the course of this proceeding as to the status and legally chargeable rates of the Edison Electric Illuminating Company in the

respondent's franchise territory and "the value of the service" rendered by the respondent, the Flatbush Gas Company, for an order requiring the latter company to put in force a general rate of eight cents per kilowatt hour or to let the Edison Company furnish the service to consumers who desire the eight-cent rate, but that under all the circumstances affecting current operations in the electric field it is better that the Commission place its decision not on the merely legal consequences of the company's status in the Flatbush area but upon a thorough analysis of the usual aspects of such a rate reduction, its probable effect upon the finances, earnings and corporate income of the company. Specific rate reductions were ordered for the first two hours' average daily use of the maximum demand from indicated periods, and a graduated rate for all current consumed in excess of the first two hours of such daily use.

HEEVEY, Commissioner.—Electricity for general consumption in the borough of Brooklyn is furnished by two companies—the Flatbush Gas Company, which operates in the twenty-ninth ward (formerly the town of Flatbush) and against which the complaint in this proceeding is directed, and the Edison Electric Illuminating Company of Brooklyn, which operates in the other thirty-one wards of the borough but has not yet furnished service in its franchise area in the twenty-ninth ward. The latter company has, however, several electric transmission lines running through the twenty-ninth ward, from which its residents could be supplied with service. The "Flatbush Section" of Brooklyn, comprising the twenty-ninth ward, is one of the finest residential regions in Greater New York, and is closely built up with homes which use large quantities of electric current.

In previous legislation directly fixing rates for electric service in the several districts now embraced within the city of Greater New York, the twenty-ninth ward of Brooklyn was treated homogeneously with the other wards in Brooklyn, and the maximum rate of twelve cents per kilowatt hour for purposes other than street lighting was prescribed alike for the section of Brooklyn served by the Flatbush Gas Company and for the remaining section served by the Edison Electric Illuminating Company of Brooklyn. Laws of 1905, chaps. 732, 733. The Legislature thus indicated its view that the twenty-ninth ward should, in rate

matters, stand on a parity with other wards, and be governed by a similar maximum. The twelve-cent rate was the maximum rate charged by both of these companies within the respective areas served by them, at the time when, on June 10, 1912, separate complaints signed by more than one hundred consumers were made to this Commission against each of the companies, identical in allegations and prayer except for the designation of the defendant, the portion pertinent to this discussion being as follows:

"I. That the prices of electricity sold and delivered in the borough of Brooklyn, in the city of New York, by the Flatbush Gas Company, under its general rate of twelve cents, or its proposed rate of eleven cents, are unjust, unreasonable and excessive, and are disproportionate to the proper cost of manufacturing and delivering such electricity in said borough.

"II. That the differences in price of such electricity so sold and delivered under the general rate and the prices charged to numerous preferred customers are unreasonable, and such differences unjustly discriminate against the smaller consumers and give undue preference to the larger consumers."

Contemporaneous but separate proceedings were thereupon begun before the Commission on July 16, 1912 — one in Case No. 1540, in which the Edison Electric Illuminating Company of Brooklyn was the respondent, and the other in Case No. 1541, in which the Flatbush Gas Company was the respondent. The Flatbush Gas Company supplies both gas and electricity in this region, the proceeding of course relating only to its electrical department. At the very first hearing in the latter case, counsel for the Flatbush Gas Company asked that the hearing be adjourned for all purposes until after the hearing and decision of the case of the Brooklyn Edison Company, and the expediency of deferring the determination of this case till after the outcome of the other case had been determined, was several times urged upon the Commission by the Flatbush Gas Company. To this insistence, the Commission at times gave a measure of heed.

Just prior to the commencement of the proceedings in Case No. 1540, the Brooklyn Edison Company reduced its maximum rate

from twelve cents to eleven cents per kilowatt hour. An opinion in the Brooklyn Edison case was handed down on October 27, 1916, accompanied by an order fixing the maximum price for electricity at eight cents per kilowatt hour. *Moritz v. Edison Elec. Ill. Co. of Bklyn.*, 7 P. S. C. R. 1st Dist. N. Y. 175. By a supplemental opinion and order of December 27, 1916, modifications were made in certain details of the schedule of prescribed rates, including the gradation of the rates based upon the additional hours average daily use of maximum demand, under which a lighting rate of five to eight cents per hour average daily use of maximum demand and a power rate of three to eight cents per hour average daily use of maximum demand were to be established. *Moritz v. Edison Elec. Ill. Co. of Bklyn.*, 7 P. S. C. R. 1st Dist. N. Y. 259.

The initial taking of testimony in Case No. 1541 was completed at a relatively early date, namely, October, 1913, but was continued for nearly three years in Case No. 1540. When the consideration of that case was nearly completed, the Commission resumed hearings in Case No. 1541, for the purpose of bringing appraisal figures down to date and including in the record necessary data as to recent investment and operations. These hearings were continued until July 23, 1917. After the lapse of a suitable interval, briefs were submitted.

TWO-FOLD FEATURES OF THE COMPLAINT

The complaint in this proceeding is two-fold: *first*, that the prices at which electricity is sold and delivered by the Flatbush Gas Company under its general rate of twelve cents per kilowatt hour, are unjust, unreasonable and excessive by reason of the disproportionate relation of those rates to the cost of the service, the return they allow on the corporate property, and their excess over the fair value of the service rendered as attested by the rates chargeable by the Edison Company in the same territory; and, *second*, that the differences in the prices charged various consumers of such electricity are unreasonable, unjustly discrimina-

tory and unduly preferential. The two phases of the complaint will be separately considered.

"VALUE OF THE SERVICE" AND "A FAIR RETURN"

For reasons which in sequence will be fully commented upon, I am of the opinion that, in the facts indicated, in the course of this proceeding, as to the status and legally chargeable rates of the Edison Electric Illuminating Company in the respondent's franchise territory and "the value of the service" rendered by the respondent, the Commission might find warrant for requiring the Flatbush Gas Company forthwith to put in force a general rate of eight cents per kilowatt hour or let the Edison Company furnish the service to consumers who desire the eight-cent rate. Under all of the circumstances affecting this company and current operations in the electric field, however, I think it preferable that the Commission place its decision on no basis merely of the legal consequences of the company's status in the Flatbush area. It seems better that the Commission in determining whether it will or not order the immediate promulgation of the eight-cent rate, should proceed also and first to a thorough analysis of the usual aspects of such a rate reduction, determine its probable effect on the finances, earnings and corporate income of the company, and perhaps even put the reduction in force on a somewhat moderate and gradual basis which will afford the certainty of full disclosure as to the probable effects of such a reduction, before the eight-cent rate has been placed permanently in force. For this reason, I shall proceed with a full analysis of the applicable legal principles and endeavor to ascertain the reduction, if any, which may be ordered without doing violence to the company's right to earn a fair return upon the money which investors have placed and left in the project. From the point of view of the results of this scrutiny, it appears, as will be later amplified, that the Commission would be within its rights in ordering the adoption of the eight-cent rate. Especially in view, however, of the factors of uncertainty which arise from the prevalence of the world war and the consequences of various costs and values which

the company has correctly conceded could not be urged as a binding basis for a determination in this case, I think that a sealed reduction may best be followed, under which the company is permitted to retain for the present the right to charge a rate slightly in excess of what the present facts warrant. Such a course will combine the advantages of the company's early compliance with its obligation to install an eight-cent rate, unless such a rate is proved by experience to be altogether inadequate, and also the advantage of such a gradual reduction as will afford complete security against any impairment of the company's return upon its property.

SUMMARY OF FINDINGS

As a result of the analyses and conclusions hereinafter set out in detail, I reach the view that the Commission should order in effect certain reductions which may be briefly indicated as follows:

For the first two hours' average daily use of the maximum demand, the following schedule of charges:

From March 1, 1918, to and including August 31, 1918, ten cents per kilowatt hour.

From September 1, 1918, to and including February 28, 1919, nine cents per kilowatt hour.

From and after March 1, 1919, eight cents per kilowatt hour.

For all current consumed in excess of the first two hours' average daily use of the maximum demand, from and after March 1, 1918, not more than six cents per kilowatt hour.

The details of certain recommendations in connection with these readjustments in rates, including a minimum charge of twelve dollars a year, distributable over the twelve months, are set forth at the close of this opinion.

My recommendation that the rates be reduced as above is based upon a determination, from all of the evidence, that for the purpose of determining the reasonableness of the return allowed by the present rates, the total fair value of the company's property, taking into account all of the elements specified by statute

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and judicial decision, is to be taken as approximately \$1,300,000, which figure is somewhat in excess of the company's book figures covering the investor's outlay — thus representing the company's capital investment in its electric business.

From 1912 to 1916, the company's profits (before the deduction of depreciation reserve) from its electric business increased from \$93,000 to \$243,000.

An annual deduction of \$60,000 for depreciation reserve (which is equal to four per cent of the cost of depreciable property) seems reasonable, leaving a return of not less than \$183,000. This would be equivalent to a 14 per cent return on a property valuation of \$1,300,000.

Except for abnormal costs which the company concedes should not be a basis of determination, the 1917 and 1918 return would substantially exceed this figure.

Neither the ten nor the nine-cent rate will bring the company's return any where near the point of unremunerativeness.

This scaled reduction is confidently submitted for the test of actual experience. Further reductions will be withheld if the first prove unfavorable in financial consequences.

If margin of error there is in the analyses and recommendations of this opinion, it may be confidently asserted to be on the side of allowing the company to retain, even during the experimental period, a general rate in excess of eight cents. Conservatism in this respect seems warranted, however, by current conditions.

CONSIDERATIONS IN DETERMINING A REASONABLE RETURN

All charges made or demanded by an electrical corporation for electricity or any service rendered or to be rendered "shall be just and reasonable and not more than allowed by law or by order of the commission having jurisdiction." Pub. Serv. Com. Law, § 65. This is the statutory standard to which rates must conform. The statute under which this proceeding is brought does not categorically specify the *criteria* for testing the reasonableness of existing rates or for fixing rates for the future, except

to confine the action of the Commission in rate-making "within lawful limits" and to require the Commission to consider "all facts which in its judgment have any bearing upon a proper determination of the question" and to give "due regard among other things to a reasonable average return upon capital actually expended and to the necessity of making reservations out of income for surplus and contingencies." These provisions are set forth in section 72 of the Public Service Commissions Law, which in part is as follows: "After a hearing and after such an investigation as shall have been made by the commission or its officers, agents, examiners or inspectors, the commission *within lawful limits* may, by order, fix the maximum price of gas or electricity not exceeding that fixed by statute to be charged by such corporation or person, for the service to be furnished; * * *. In determining the price to be charged for gas or electricity the commission may consider *all facts* which in its judgment have any bearing upon a proper determination of the question although not set forth in the complaint and not within the allegations contained therein, with due regard among *other things* to a reasonable average return upon *capital actually expended* and to the necessity of making reservations out of income for surplus and contingencies."

What are the "lawful limits" and "other things," besides a reasonable average return upon capital actually expended and reservations for surplus and contingencies, are left undefined by the statute. But in bespeaking "due regard" to a reasonable average return upon "*capital actually expended*," the Legislature singled out for emphasis the concept of public policy and of mutual interest of investors and patrons which is the theme of the plan of public service regulation now statutorily delegated to this Commission.

UNIT PRICES AT WAR-TIME LEVELS

Notwithstanding this and other clear expressions of the legislative intent and the public policy as to the paramount consideration, founded in reasonableness and justice, which must guide this Commission in the adjustment of rate questions arising

between the public and the utilities, it is contended by the respondent in this proceeding that it is entitled to a fair return upon the amount of property used by it in the public service, measured by opinion estimates of the reproduction cost thereof, even where data of actual cost is available. The claim that its return should be calculated on estimates of what it ought to cost to reproduce the property is moderated by its obviously proper concession that there should first be deducted from the face of these estimates the amount of the accrued depreciation, figured, not on the reproduction cost new of the property, but upon the much lesser amount of original cost, and also that the unit prices to be assumed or assigned for the reproducing of the property, should be taken from or reduced to pre-war and normal market levels. If, however, it is to be recognized that the value of the property upon which the respondent is entitled to earn a return through its rates is to be measured solely by the reproduction cost thereof, unaffected by consideration of the actual outlay therefor by the investors and regardless of the methods and conditions of original construction, then logically there would seem to be no escape from the conclusion that the respondent would be entitled to claim a return upon such a property cost as would be attributable to it if all the property were produced or reproduced in one continuous operation at present-day market prices of labor and materials.

In the present juncture of universal upheaval, the application of such a postulate of evaluation to rate-making would lead to startling consequences. Without a dollar of additional investment and in the face of adversity and suffering, the value of the respondents' property would be deemed to have vastly increased, and the amount which the company's investors are entitled to take from the consumers would be deemed to have greatly increased, simply because a world war has demoralized market conditions. Upon the restoration of normal conditions, investment made in property of the company at war time market prices will of course shrink in value, perhaps violently, as prices tend to resume normal levels, and even the investments previously made might shrink

if there should be a considerable depression in market quotations. The present and prospective situation of property values, material costs, etc., throughout the world, emphasizes the unreliability, unfairness, and fiscal dangers of computing return on estimates of reproduction cost less depreciation. A standard so oscillating and fluctuating could not offer any permanency or security either to the patronizing public or to the investors, and is unjust. The learned counsel for the company sagely abandoned any contrary contention, but failed to abandon some of its inevitable implications.

THE COURTS AND THE BASES OF RATE REGULATION

On the other hand, the claim that, even when the data of actual outlay is available, estimates of reproduction cost must be accepted as basis and measure of value in rate-making for the reason that other measures, particularly original cost, or investment outlay, are to be regarded as having been judically rejected, is not sustained from the standpoint either of reasonable regulation or of constitutional guarantees. Recent decisions of the highest courts of the State and the Nation have been such as to make pertinent and timely a re-examination of fundamentals, and re-survey of supposed bases, in this regard.

"The basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction," it was held by the United States Supreme Court in *Smyth v. Ames*, 169 U. S. 466, 546, "must be the *fair value* of the property being used by it for the convenience of the public." The court was there speaking only from the standpoint of the constitutional guarantees covering the property invested in a public service enterprise and the use thereof for profits to the owners. This holding by the United States Supreme Court is, indeed, elementary in rate making from whatever standpoint considered. The Supreme Court in that case indicated the scope of inquiry for the ascertainment of "fair value of the property" used for the convenience of the public, but laid down no definition of "value." That the value of property as a rate base is not

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the same "value" as used by economists is now generally conceded, although the question has been a subject of juridical debate during the twenty years that have elapsed since the concept of what was loosely and inexactly called "value" was set up as a factor in the rate base, through the decision of the United States Supreme Court in *Smyth v. Ames*. If "fair value," as the term is used by the courts, were construed to mean market value, earning value or exchange value, there would be no necessary relationship whatever between the two rate bases of "investment" and "fair value," since exchange value depends upon income. Any mercantile business or property has "value" on the basis of what it can yield in net income. In competitive industries, economic forces, when unchecked, will produce something like a normal relationship between the amount of capital invested (or the value of capital goods representing investment) and the income yield. In non-competitive industries, such as the business of public utilities, the yield of abnormally high profits may continue without check. The exchange or market value of the business of a public utility protected from competition may, therefore, become altogether disproportionate to the capital invested. Public regulation is established as a substitute controlling force in place of free competition. It is required to fix rates which will do away with abnormally large returns, just as competition among owners of capital does away with such profits where there is perfect economic freedom. The value of the business, which value is itself a multiple of the return, cannot measure the return which ought to be earned by the owners. In a case like that here before the Commission, it is difficult to see how the ascertainment of the value of the property, using that term as the equivalent of market or exchange value, can be of assistance in determining a reasonable rate or charge which consumers should be required to pay.

"EXCHANGE VALUE" NOT "FAIR VALUE"

"Fair value" manifestly cannot mean exchange value. *People ex rel. Kings County Lighting Company v. Willcox*, 210 N. Y.

479, 487. In point of fact, "fair value for rate purposes" as judicially construed, depends on concepts not identified with "value" in the economic sense at all. With the elimination of the idea of "exchange value" as a possible rate base, there necessarily disappear the claims of utilities for a return upon franchise values, good will, "going concern value" beyond unreimbursed early losses, and similar expressions of mere earning capacity.

Notwithstanding that exchange value of the business as a whole is generally conceded not to be the proper base for fixing such rates as will yield a reasonable return to the owners of the property, it has been repeatedly contended, with a great deal of plausible support from *dicta*, and in some instances from rulings, of courts as well as from discussion indulged in by public utility operators and the publishers of journals devoted to that field of activity, that the value of a public utility business as a whole, for rate purposes, must be taken to be what it would cost to reproduce the property under a computation which takes the present market prices of the material and labor constituents and diminishes them by the deduction of what is called "accrued depreciation" but is in reality accrued liability to replace. The anomaly is thus presented of conceding the propriety of rejecting as a rate base the market value of the property as a whole and substituting therefor a market value computed piece-meal; that is to say, not even the aggregate value which would be derived from the unit use of the market price of the constituent items which used or second-hand pieces of such property would command, but the market price new of the constituents diminished by a percentage proportionate with the period of expired life of the respective constituents. It is urged that these calculations must be followed and their results accepted, even where the actual data is at hand and shows both the calculations and the results to be grossly inaccurate. The paramount weight thus attributed to estimates of reproduction cost as a measure of value for rate purposes is assumed necessarily to follow from various decisions in which original cost or investment as represented by the securities issued

therefor has been held to be unreliable as a measure of the amount of property involved in unconstitutional deprivations, or in which reliable data for computing the real cost was not available, and in which resort has, therefore, been had to other methods of measurement. From these holdings there has been deduced a formula of reproduction cost; but, as I believe, this formula disregards the reasoning and justice of those decisions.

A CHAPTER FROM VALUATION HISTORY

To get the correct bearings of the matter, it is necessary to keep in mind at least an outline of our history and experience, as regards public utility enterprises and the relationship between securities issued, moneys invested, property used in the service, and the "fair return" to be derived from rates. Most of the early expressions of the courts as to the bases of valuation arose in cases involving pioneer projects of railroad construction. At that time, there were virtually no restrictions on the issuance of either stocks or bonds by railroad corporations; the capacity of the printing presses and the willingness of a credulous public to purchase constituted the only limitations. There were then no requirements that the companies should keep accurate, comprehensive, or even honest, accounts, uniform or otherwise. The charge of falsification of books for stock-jobbing purposes and the deception of investors was as common as the failure to keep them in such a form as to disclose anything comprehensively regarding the company's expenditures and property holdings. Moreover, the promoters of such projects were frequently dishonest and often imprudent or inexperienced. Money supposed to be laid out providently for construction purposes or new property was sometimes stolen, often extravagantly expended or wasted, and very commonly employed in such a way as to yield nothing of real utility in the service of the company.

Such were the conditions which gave rise to the demand for rational control in the public interest. Promoters of the projects had shown a propensity for holding out the prospect of low rates until the communities had invested heavily, and then raising rates

wantonly and outrageously. The public wanted uniform rates, equality in treatment, and rates as low as possible — oftentimes too low. The promoters wanted rates as high as possible, and wanted to be free to aid their friends and punish their enemies. Thus started the demand for legislative supervision of rates, in the interests of keeping them reasonable in amount, uniform and non-discriminatory as between shippers and similar classes of traffic. The public then began to try to force rates down through governmental action. Maximums were prescribed. The companies rushed to court, with the plea that they had, with governmental sanction or even encouragement, put money into railroad projects which they might otherwise have invested similarly as capital in private enterprises, and that accordingly the judicial power of government should be invoked to see to it that their rates should not be forced down to a point where they could not, with good management, earn a fair profit on their investment — similar to what they could have earned through a private outlay of their capital. This seemed reasonable to the courts and the investing public, and perhaps also to the general public; and so came the beginnings of judicial review of regulative reductions of rates.

“But on what do the investors in the companies contend they are entitled to earn six or eight per cent interest?” very naturally inquired the courts and the representatives of the general public. To say “the fair value of the property for rate purposes” only begged the question, then as now. The answer was then by common sense of right, as it is now by explicit statutory indication: “To derive what the law regards as a reasonable return on the fair value of their property, the companies are entitled to charge such rates as will assure that, with proper management, they will be able to pay to their investors a fair return on the money actually expended for property used and useful in serving the public.” It was of course easy to agree that the fair return should be predicated only on the capital expended for property actually used and useful in the service, because mistakes of management and outlay had been many, and such a rule was necessary to avoid oftentimes

the saddling of patrons permanently with the consequences of gross blunders and even willful diversions of funds in the interests of contractors, construction companies, and others.

"REPRODUCTION COST" AS A GUIDE TO CAPITAL OUTLAY.

But how was the quantum of investment outlay to be ascertained? How was the court to ascertain the amount of "capital actually expended" (Pub. Serv. Com. Law, § 72), the amount of money which investors had actually put into and left in property devoted to the public service? The companies first urged that their rates should be left such as to yield the interest on their bonds and a fair dividend on their stock, or, at least, that the rate of return should be figured upon the total par or face value of outstanding securities. It was said that this was the simplest and most direct way of protecting investors and allowing a fair return on actual outlay for the public service. The difficulty, however, as the courts quickly apprehended, was that the securities had been issued without any public regulation or supervision, without any defined relation to the value of the corporate property, and without any real restriction except the facility with which they could be disposed of at *some* price in the market. They had not been put out at par or face value; oftentimes they had been given away outright or issued in exchange for property worth far less than their par value. Obviously, the amount of outstanding securities afforded no safe or accurate revelation or measurement of the amount of money investors had put into property devoted to public use. Thus it became evident that the proper amount of corporate income would have to be computed in some other way, and the company then left to divide that income, as far as it would go, among the holders of its securities. Certain other ways of ascertaining the actual amounts of these outlays were not then available. For example, often times the books and accounts of the companies were not honestly or comprehensively kept, under any sort of public supervision or audit; and in consequence these books afforded neither a dependable statement of the amount of money or property actually put into the project by its investors

and security-holders, nor an honest, accurate statement of the company's actual outlay of capital funds in property. And, of course, as already commented upon, the market or exchange value of the corporate property in gross afforded no index of "capital actually expended" for such property, because the market salability of the project depended so largely on the traffic it could command and the rates it was permitted to charge. Values based on the rate could not be used in determining what the rate should be.

If neither the securities nor the books afforded an accurate index of what the investors had laid out in the property, and no dependable data of actual outlay could be secured, it was evident that the "fair value" of the property for rate purposes must under such circumstances be found by some other method. "How much would you have to expend to bring the same or an exactly similar property into being again?" seemed to be a standard little open to the effects of falsified entries, over-capitalization, and wasteful contracts with favored contractors. Thus in the same breath in which present market value of the property in gross was held, properly, to be no valid basis for a computation of return, the courts developed a tendency to resort, where figures of actual capital investment were unavailable, to the concept of trying to compute the necessary outlay in reproducing the property. Actual quantities of the various kinds of property owned by the company were inventoried — it was felt that no opportunity for fraud existed here — and then unit prices, of common knowledge, easily checked up, were applied to these listed quantities. Such a computation of the amount of capital which would have to be expended to create such a property anew was deemed to be "the next best thing" to having the figures showing what had been actually expended. It should be noted that this method of ascertaining "reproduction cost" was resorted to, not for the purpose of arriving at a different and better index of "fair value" than would be afforded by actual figures of the "investment sacrifice," but as the only available method of arriving at the probable *quantum* of investment outlay, when no *reliable* figures thereof could be had from actual records. That

this was what was sought was emphasized by the development of the rule recognizing the addition of what was called "going value." By this concept an allowance, over and above the capital amount actually expended for property, to cover the shortages of return in the earlier years of the project, may be made. It was felt that the returns which the investors had not been able to take out of the project should be added to what they had actually put into it. And it is of course obvious that at such a stage in the development of the law of valuation, "reproduction cost new" yielded almost invariably an outlay figure far less than the par value of securities, far less than the fictitious book entries, and substantially less than the amounts which mismanagement, mistakes, and possible collusion with contractors, had taken from the corporate treasury in producing the properties in the first instance.

To ascertain "fair value" in part through such a method, when no more dependable figures of actual value could be had, thus led to results favorable to the public interest and defeated corporate contentions which otherwise must have prevailed, until such time as the limitation of capitalization and the requirement of accurate, uniform accounts were set up. It was only in more recent years that the assumption sprang up that "reproduction cost" is "fair value;" that an available auxiliary in *method* has become the controlling objective; and that a Commission is bound to accept estimates reached by this method, even when figures resulting from Commission control of securities, supervision of outlays, and requirement of sound bookkeeping methods, are at hand to give the lie to the conclusions predicated on such estimates. With the availability of data of actual outlay, far more dependable than any "opinion estimates" of engineers, there has arisen a manifest judicial disposition to reassign "reproduction cost" to its proper place and give to the products of Commission scrutiny of accounts, securities, and expenditures the weight which they deserve and without which the whole regulative plan becomes the prey of "experts willing to swear to anything and skilled in making it plausible." One of the basic purposes of the Commission plan of regulation has been

held to be the protection of the investing public, through prevention of capitalization in excess of outlay on the one hand, and assurance of a fair return on invested capital, on the other (People ex rel. New York Edison Co. v. Willcox, 207 N. Y. 86, 93; People ex rel. D. & H. R. R. Co. v. Commission, 197 id. 1), and it is only natural that a requirement found its way into the statute that in rate-making, the Commission should give due regard to a return on the "capital actually expended."

THE ABANDONMENT OF ARTIFICIAL RULES

The swing away from the artificial concepts which had been conjured up in the guise of "reproduction cost new," became marked in the Minnesota Rate Cases, 230 U. S. 352, 434, in which the Supreme Court of the United States ruled that: "The ascertainment of that value [fair value] is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts."

That reproduction cost must be accepted as the controlling factor in ascertaining fair value has never been established. On the contrary, the court, as far back as *Smyth v. Ames*, *supra*, indicated various factors to be regarded within the scope of the inquiry as to the value of the property. In that case, it was asserted by counsel in behalf of the railroads that one of the leading features of the railroad system of the United States, as it had grown up and been established under every sanction of law and public sentiment, was "that the prices of carriage are everywhere fixed, not by the railroads nor by shippers, but by the same imperious power which fixes the price of all other articles or services, namely, the pressure of competition," and it was contended "that a railroad company is entitled to exact such charges for transportation as will enable it, at all times, not only to pay operating expenses, but also to meet the interest regularly accruing upon all its outstanding obligations, and justify a dividend upon all its stock." 169 U. S. 466, 505, 543.

Unless the foregoing decision is read in the light of the issues,

the contentions, the context and the court's conclusion, the full import of the holding of the court cannot be apprehended. Actions were brought by stockholders of various railroad corporations against those corporations and officers of the State of Nebraska to enjoin the enforcement of an act passed in 1893 by the Nebraska Legislature fixing certain maximum freight rates. The Circuit Court adjudged the act to be repugnant to the Constitution of the United States.

The Supreme Court, saying that it perceived no ground on the record for reversing the decree of the Circuit Court, elaborated the reasons leading to the conclusion.

Its conclusions as to the effect of the Nebraska statute, the court added, found "some support" in the report of the board of secretaries of the Nebraska board of transportation, made in September, 1891, to the board itself, in which it was found "that the railroads in this State could not be duplicated for a less sum than \$30,000 per mile, taking into consideration their equipments and depot and terminal facilities," and that the railroads were not in a condition to stand, nor did their earnings, "figured on a basis cost of \$30,000 per mile *and not what they claim they cost*," justify any cut in local State rates at that time.

The court did not, nor was it called upon, to find the value of the property as a rate base, nor did it enunciate any sole rule or method of valuation. A claim was made by the carriers to a right to exact such charges as would enable them, *at all times*, not only to pay operating expenses, but also to meet interest charges on outstanding obligations and justify a dividend upon *all* its stock, as stated by the Supreme Court.

It was said in the case of *Reagan v. Trust Co.*, 154 U. S. 412, 14 Sup. Ct. 1059: "It is unnecessary to decide, and we do not wish to be understood as laying down an absolute rule, that in every case a failure to produce some profit to those who have invested their money in the building of a road is conclusive that the tariff is unjust and unreasonable. And yet justice demands that every one should receive some compensation for the use of his money or property, if it be possible, without prejudice to the rights of others.

"It is not always reasonable to cast the entire burden of the depreciation on those who have invested their money in railroads. * * *"

SECURITIES NOT AN INDEX OF INVESTMENT OUTLAY

When the United States Supreme Court came to review the claim in behalf of the railroads to a recognition in full of their obligations and securities and to their right to place upon the patrons the burden of paying the interest charges and dividends upon all the carriers' capitalization and at all times, there were fresh in their minds the notorious facts, stated by the Circuit Court, of corporate overcapitalization, mismanagement and extravagance which were not infrequent in the earlier history of railroad financing, construction and operation.

It was this sort of a rate base which the United States Supreme Court rejected when it held: "*In our opinion, the broad proposition advanced by counsel involves some misconception of the relations between the public and a railroad corporation. It is unsound in that it practically excludes from consideration the fair value of the property used, omits altogether any consideration of the right of the public to be exempt from unreasonable exactions, and makes the interests of the corporation maintaining a public highway the sole test in determining whether the rates established by or for it are such as may be rightfully prescribed as between it and the public. A railroad is a public highway, and none the less so because constructed and maintained through the agency of a corporation deriving its existence and powers from the State. Such a corporation was created for public purposes. It performs a function of the State. Its authority to exercise the right of eminent domain and to charge tolls was given primarily for the benefit of the public. It is under governmental control, though such control must be exercised with due regard to the constitutional guarantees for the protection of its property. Olcott v. Supervisors, 16 Wall. 678, 694; Sinking Fund Cases, 99 U. S. 700, 719; Cherokee Nation v. Southern Kansas Railway, 135 id. 641, 657. It can-*

not, therefore, be admitted that a railroad corporation maintaining a highway under the authority of the State may fix its rates with a view solely to its own interests, and ignore the rights of the public. But the right of the public would be ignored if rates for the transportation of persons or property on a railroad are exacted without reference to the fair value of the property used for the public or the fair value of the services rendered, but in order simply that the corporation may meet operating expenses, pay the interest on its obligations, and declare a dividend to stockholders."

In holding that it is unfair to the public that rates should be governed by the requirements, in addition to operating expenses, of fixed charges and dividends upon inflated capitalization, conceived in "injudicious contracts, poor engineering, unusually high cost of material, *rascality* on the part of those engaged in the construction or management of the property," the court did not by any stretch of imagination imply that the "reasonable, proper and necessary investment made by it to serve the public" (as expressed by the Court of Appeals at 210 N. Y. 495), shall not ever be a fair and constitutional basis of rates.

In view of the untrustworthiness of the par value of capitalization, either as giving rise to an equitable claim by security holders to payment by the public, through rates, of a return sufficient to pay interest charges and dividends in addition to operating expenses, or as denoting the extent of property rights which may be alleged to be threatened with confiscation, the court turned to other criteria of value and indicated the general scope of an inquiry into fair value of property devoted to the public service, as set forth in the succeeding portion of the opinion above quoted. The court did not, in *Smyth v. Ames*, determine the fair value of the property in question, and did not itself apply the general principles to be applied in ascertaining fair value for rate purposes. Having held capitalization issued under the vicious conditions pointed out not to be the content of the property rights to be protected and the par value of such capitalization not to be synonymous with "fair value," the United States

Supreme Court proceeded to outline other criteria of fair value. No searching investigation had been made of the actual, reasonable and legitimate expenditures of the carriers to demonstrate what the true investment was, and even the rather vague proof of present value furnished in the report of the Board of Secretaries of the Nebraska Board of Transportation did not adopt "what they [the carriers] claim they [the railroads] cost." The court did not hold that original cost or "reasonable, proper and necessary investment" did not fully measure the property rights to be safeguarded, but condemned par value capitalization and book value as not representative of fair investment, in the light of the current history of corporate financing. The court sounded a warning to security holders that the constitutional guarantee of property rights did not extend to fictitious values which rest in documentary fiat and not in investment actually contributed to the public service.

Subsequent authoritative judicial holdings have oftentimes been misapprehended to be rulings against giving to original cost and investment a controlling weight, or even any weight at all, but have only restated the precedent of *Smyth v. Ames* in condemning capitalization, investment and original cost, represented in scrip, the nominal amount of which was inflated through the vicious and fictitious transactions, either as giving rise to an equitable claim against the public to assure interest charges and dividends or as measuring the value of the property of the corporation.

"FAIR VALUE" v. "CAPITALIZATION"

In *San Diego Land Company v. National City*, 174 U. S. 739, 757, 758, affirming the dismissal of a bill to enjoin the enforcement of water rates, the United States Supreme Court, after quoting the views expressed in *Smyth v. Ames*, 169 U. S. 466, overruled the contention that the carriers were entitled to a return sufficient to pay operating expenses and also interest on obligations and dividends on stock.

The court here again was impressed with the possibility of

unfairness to the public in giving complete recognition to that species of book investment which had been so scathingly condemned. A basis of calculating the reasonableness of the rate is defective, the court here says, which does not require "the *real* value of the property and the fair value in themselves of the services rendered to be taken into consideration." And the court restates, but does not enlarge upon, the point: "What the company is entitled to demand, in order that it may have just compensation, is a fair return upon the reasonable value of the property *at the time it is being used for the public.*" The present tense in the time of value was used by the court not to indicate reproduction cost (in the sense now ascribed to that term), but to render more striking the contrast between "real value" and fictitious value thus described in the opinion: "The property may have cost *more than it ought to have cost*, and its outstanding bonds for money borrowed and which went into the plant may be *in excess of the real value of the property.* So that it cannot be said that the amount of such bonds should in every case control the question of rates, although it may be an element in the inquiry as to what is, all the circumstances considered, just both to the company and to the public."

FICTITIOUS CLAIMS OF ORIGINAL COST

In *San Diego Land & Town Company v. Jasper*, 189 U. S. 439, 442, 443, the Supreme Court, while holding that "No doubt cost may be considered, and will have more or less importance according to circumstances," again rejected inflated and fictitious claims of *original cost*.

Where the company's own records revealed the fact that its book cost of construction was grossly inflated by a large sum wasted in the management of the company, and there was no proof of "the reasonableness of that cost, its propriety or necessity," the United States Supreme Court held, in *Stanislaus County v. San Joaquin & King's R. C. & I. Co.*, 192 U. S. 201, 214, that the rate-fixing board was justified in reducing, if not required to reduce, "the cost of construction, upon which rates

might be fixed," by at least the amount mentioned to have been wasted.

While qualifying the use of investment as the measure of property value, or the rate base, upon which the return is to be calculated, because of the probability of inflation, the Federal court, having no proof of facts showing such inflation, accepted the construction account as representing the fair value of the property. *Southern Pac. Co. v. Bartine*, 170 Fed. Rep. 725, 750.

THE KNOXVILLE WATER CASE

In three cases which were decided by the United States Supreme Court in 1909, the question of original investment was given consideration. In *City of Knoxville v. Knoxville Water Co.*, 212 U. S. 1, in which the United States Supreme Court directed a dismissal of a bill to enjoin the enforcement of water rates, the company's original case was based upon an elaborate analysis of the *cost of construction*, from which large deductions were made on account of depreciation, in order to arrive at the present value of the plant. The company contended that in fixing upon the value of the plant upon which the company was entitled to earn a reasonable return the amount of depreciation should be added to the present value of the surviving parts. The Supreme Court held that this method was properly disapproved by the lower court.

The court does not here in any way minimize the reliability of original cost as a rate base, but holds that, in determining the present true value of property, depreciation must be deducted, even though through mismanagement the company failed to keep the investment unimpaired. It is the *investment* which it is the duty of the company to its bond and stockholders to make provision to keep unimpaired.

After the Knoxville Water Company closed its case, the city undertook to determine the present value of the company's property by "the plain method of ascertaining the cost of reproduction, diminished by depreciation," and in rebuttal the company followed the same method, though the results differed largely,

and the trial court made no allowance for depreciation. The court said: "*The cost of reproduction is one way of ascertaining the present value of a plant like that of a water company, but that test would lead to obviously incorrect results, if the cost of reproduction is not diminished by the depreciation which has come from age and use.* * * * *The cost of reproduction is not always a fair measure of the present value of a plant which has been in use for many years. The items composing the plant depreciate in value from year to year in a varying degree.* * * *"

In order to ascertain present value, either by original cost method or reproduction method, the court held that there must be a deduction for depreciation, but nowhere does the court confine present value to reproduction cost.

Counsel for the company urged the court that the capitalization of the company ought to have some influence in determining the value of the property. This paper value of investment the court rejected.

In the foregoing cases, in which the court repeatedly rejected the claim to a recognition, as a rate base, of book investment or cost not justified by proof of "the reasonableness of that cost, its propriety or necessity," but entered in accounts as an asset to balance the liability charge for the par value of stocks and bonds issued, in the interest of promoters, contractors or financial operators, the courts condemned as a rate base or measure of property value, not the reasonable, proper and necessary outlay for the property, but fictitious or inflated capitalization. The rejection of such a rate base was not due to any view that reasonable, proper and necessary investment was not entitled to great weight as a factor in the determination of the reasonable rates but because its adoption would have been manifestly grossly unfair to the public.

THE CONSOLIDATED GAS LITIGATION

In the Consolidated Gas Company Case, 157 Fed. Rep. 849; revd., 212 U. S. 19, the claim to original cost as the measure of the value of the property upon which the return was to be calculated for rate purposes was presented in behalf of the State,

city and this Commission. If the statements in the decision of the lower court restraining the enforcement of the gas rates, and in the decision of the Supreme Court reversing the order of the lower court, stood alone and were not to be taken as part of a series of judicial authorities pertaining to the determination of fair value in rate cases, there would be semblance for the assertion that, in the Consolidated Gas case, reproduction cost of the plant based upon the market or exchange value of the constituents, was employed as a controlling criterion of value for rate purposes. Considered, however, in the light of the authorities upon which the views expressed in the Consolidated Gas case were based, and of the subsequent decisions, legislation and regulatory policy toward public service enterprises, the conclusion is inevitable that the Consolidated Gas case is not to be taken as a modification or alteration of those principles of rate-making which concern the question as to the consideration to be given to present investment value.

Counsel representing the public authorities in the Consolidated Gas case contended that the value to be assigned to the property in question was the equivalent of the surviving capital actually invested. When this phase was passed upon by the Circuit Court, that court said (*Consolidated Gas Co. v. City of New York*, 157 Fed. Rep. 849, 854-856): "As to the reality, the values assigned are those of the time of inquiry; not cost when the land was acquired for the purposes of manufacture, and not the cost to the complainant of so much as it acquired when organized in 1884, as a consolidation of several other gas manufacturing corporations. It is objected that such method of appraisement seeks to confer upon complainant the legal right of earning a fair return upon land values which represent no original investment by it, does not indicate land especially appropriate for the manufacture of gas, and increases apparent assets without increasing earning power. Analogous questions arise as to plant, mains, services, and meters; the reported values whereof are the reproductive cost less depreciation, and not original cost to the complainant or its predecessors, etc."

THE SUPREME COURT ON METHODS OF VALUATION

The United States Supreme Court reversed the decision of the Circuit Court, which had restrained the enforcement of the gas rate in issue, but, as to the method of valuation (*Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 52), said: "And we concur with the court below in holding that the value of the property is to be determined as of the time when the inquiry is made regarding the rates. If the property, which legally enters into the consideration of the question of rates, has increased in value since it was acquired, the company is entitled to the benefit of such increase. This is, at any rate, the general rule. We do not say there may not possibly be an exception to it, where the property may have increased so enormously in value as to render a rate permitting a reasonable return upon such increased value unjust to the public. How such facts should be treated is not a question now before us, as this case does not present it. We refer to the matter only for the purpose of stating that the decision herein does not prevent an inquiry into the question when, if ever, it should be necessarily presented."

Despite the guarded and cautious reservations of the Supreme Court, leaving the question open to inquiry when, if ever, it should be necessarily presented, there is at least a limited concurrence with the Circuit Court in the latter's reasoning: (1) The Circuit Court construed the continued use of the present tense in the decisions of the Supreme Court in respect to the value of the property to mean "that the actual or reproductive value at the time of inquiry is the first and most important figure to be ascertained." In fact, none of the decisions of the Supreme Court, as already pointed out, had held "actual" value and "reproductive" value were synonymous; on the contrary, the Supreme Court had emphasized actual value at the time of the inquiry as distinguished from inflated or fictitious values represented by capitalization of a past period. There is no fair deduction from the reasoning which led that court to reject inflated or fictitious capitalization and false book entries that reproductive value is the first and most important figure. (2) The Circuit Court justifies the repro-

duction cost because "upon reason, it seems clear that in solving this equation the plus and minus quantities should be equally considered, and appreciation and depreciation treated alike." The rejection of the claims to original cost represented by capitalization had not been based upon depreciation of the property, but upon original overestimation and disappearance of property through error or mismanagement. The reason which had led the courts to reject original cost upon that basis had nothing to do with physical or functional depreciation. To say that the allowance of property value upon the cost of the property less depreciation justifies, as a matter of equation, the allowance of appreciation, misconceives altogether the reason and effect of the depreciation deduction, for, in the first place, as was held in the Knoxville case, it is the right and the duty of the company to exact from the patrons a sum sufficient to cover this depreciation and to provide for replacement of the depreciated property, and, in the second place, the depreciation reserve is a repayment by the consumers to investors of the capital consumed in the public service and is to replace the depreciated property; in universal practice, it is not a fund kept intact, but is normally represented in equivalent property which is included in the valuation upon which the rate is based, as a result of which there is practically no material change in the investment value. Moreover, in the statutory provision that the Commission shall fix the rate with due regard, among other things, "to the necessity of making reservations out of income for surplus and contingencies," the Legislature furnishes to the utilities a safeguard against unfavorable conditions which would depress their earnings or weaken their ability to maintain the integrity of their investments. (3) The viewpoint which clearly influenced the learned Circuit Court to attribute to reproductive value priority and greatest importance as a method of valuation, thereby giving to the company the added value of appreciation in market price, is that valuation for rate purposes was governed by the rule of exchange value. "The value of the investment of any manufacturer in plant, factory, or goods, or all three, is," said the Circuit Court, "what his possession would sell for upon a fair transfer from a willing vendor to

a willing buyer, and it can make no difference that such value is affected by the efforts of himself or others, by whim or fashion, or (what is really the same thing) by the advance of land values in the opinion of the buying public. It is equally immaterial that such value is affected by difficulties of reproduction." And then the court applies the same theory to the valuation of property of a public utility.

As I have already pointed out, the proposition that exchange value may be the basis of valuing the property of a public service company as a rate base is untenable. The suggestion was very briefly dismissed by the Court of Appeals in *People ex rel. Kings County Lighting Company v. Willcox*, 210 N. Y. 479, 490, 492, where the court said: "We are dealing, not with exchange values, but with the value upon which the company is entitled to earn a return," and "* * * the rate cannot be made to depend upon the exchange value, which would in turn depend upon the rate * * *."

Moreover, applying the statement by the Circuit Court, that "It can make no difference that such value is affected by the efforts of himself or others," to the valuation of mains over which pavements were laid subsequent to the installation of the mains, an allowance of value for such mains would have to be given, as the Circuit Court in fact did give, to the public utility, whereas such an allowance has finally been decided to be inequitable and unfair. *People ex rel. Kings County Lighting Company v. Willcox*, 210 N. Y. 479, 494, 495; *Des Moines Gas Co. v. City of Des Moines*, 238 U. S. 153, 171.

THE CUMBERLAND TELEPHONE CASES

In the third rate case which was decided by the United States Supreme Court in 1909 (*Railroad Commission of Louisiana v. Cumberland Telephone & Telegraph Co.*, 212 U. S. 414), it does not appear that any other method of valuation was used in the case than a computation of expenditures for the purchase and construction of the plant, and investment value was used as the basis of calculating the deserved income under rates prescribed,

as appears in the following statement by the court: "It is asserted that complainant had expended in Louisiana up to June 30, 1906, \$4,711,000.00 in the purchase and construction of exchanges and toll lines, which amount was still further increased by June 30, 1907, to \$5,394,154.43, and it is upon these totals that the percentage of net income to investment is made up."

In *Cumberland Telephone & Telegraph Co. v. City of Louisville*, 187 Fed. Rep. 637; revd., 225 U. S. 430, the master appears to have taken original cost as the maximum of the present value of the plant. The Circuit Court said that in view of the state of the record in the case it was extremely difficult to reach a satisfactory conclusion upon the subject of cost, and that "cost, *under the complications presented in the record*, would furnish a fallacious test of the actual present value of the company's plant and property," and, therefore, proceeded to pass upon the case upon the basis of reproduction cost, though endeavoring "to give proper weight to the testimony as to original cost in our effort to ascertain present values."

The United States Supreme Court reversed the decree of the Circuit Court which had enjoined the enforcement of the rates. *Louisville v. Cumberland Tel. & Tel. Co.*, 225 U. S. 430. Adopting "for the purposes of the present decision only" the figures and operating results of value used by the Circuit Court, the Supreme Court held that a clear case of confiscation had not been made out.

The notion that "present value" as a rate base meant reproduction cost rather than the real value which excluded claims of such investment as were represented only by book entries and not by presently existing property, has, nevertheless, persisted in judicial expressions in connection with statements that, after finding the original cost of the property, when possible to be done, the question still to be solved was whether such original cost is the same as the present value, which would involve the determination of the present value by the reproduction cost method. *Louisville & Nashville R. Co. v. R. R. Commission of Ala.*, 196 Fed. Rep. 800, 820.

RECOGNITION OF "ACTUAL COST" IN THE STATE COURTS

On the other hand, the propriety of actual cost as the standard of value for rate-making has been declared in other judicial determinations. In *San Diego Water Co. v. City of San Diego*, 118 Cal. 556; 50 Pac. Rep. 633, 636-638, the California Supreme Court said: "Nor would it, on the other hand, be just to the consumers to require them to pay an enhanced price for the water, on the ground that it would now cost more to construct similar works. Such a contingency may well happen; but to allow an increase of rates for such reason would be to allow the water company to make a profit, not as a reward for its expenditures and services, but for the fortuitous occurrence of a rise in the price of materials or labor. The law does not intend that this business shall be a speculation in which the water company or the consumers shall respectively win or lose upon the casting of a die, or upon the equally unpredictable fluctuations of the markets. For the money which the company has expended for the public benefit, it is to receive a reasonable, and no more than a reasonable, reward. It is to be paid according to what it has done, and not according to what others might conceivably do. In effect, the bargain between the company and the public was made when the works were constructed; and this matter is to be determined according to the state of things at that time. * * *"

In *Brymer v. Butler Water Co.*, 179 Penn. St. 231; 36 Atl. Rep. 249, 251, the Pennsylvania Supreme Court said that "Ordinarily that is a reasonable charge or system of charges which yields a fair return upon the *investment*."

And, commenting on the preceding decision, another Pennsylvania judicial tribunal, in *Wilkesbarre v. Spring Brook Water Co.*, 4 Lack. (Penn.) Leg. News 367, 380, said: "It may be contended that the rule adopted by our Supreme Court is somewhat arbitrary. But we know of no better one. The primary basis of any calculator as to the value of a water plant must be the money actually invested by the owners."

To this same effect is the determination by the Supreme Court of West Virginia, in the case of *Coal & Coke Ry. Co. v. Conley*, 67 W. Va. 129; 67 S. E. Rep. 613, 640.

THE MINNESOTA RATE CASES

In the notable decision in *The Minnesota Rate Cases*, 230 U. S. 352, the United States Supreme Court stated, as a cautious guide, that, in determining whether the right to receive just compensation for the service given to the public, which is to have the constitutional protection, has been denied, "each case must rest upon its special facts." While pointing out that the general principles which are applicable in a rate case have been set forth in the decisions, the court placed a barrier before the practice, which was being fast built up, of reaching conclusions as to the fair value of property for rate purposes through the presentation of opinionated percentage allowances, when it said: "The ascertainment of that value [fair value] is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts."

The scope of the inquiry, the Supreme Court observed, was broadly described in *Smyth v. Ames*, 169 U. S. 425. In its discussion as to the value of terminal properties, that is, lands used for the right of way, yards and terminals, the court distinguishes between present value and speculative value, and recurs, in discussing the import of present value, to the earlier decisions wherein were rejected the claims of the utilities to value based upon investment represented by inflated or fictitious capitalization, and holds clearly that speculative increment of value is inadmissible "over the amount *invested* in it and beyond the value of *similar property* owned by others." In this view the court, with far-reaching comprehension, recognized the true basis of fair value in that it concerns present real value and not original investment represented by inflated or fictitious capitalization, and in that no increment in value should be allowed over the amount "invested" in it and beyond the value of "similar property" owned by others. The opinion upon this phase is thus summarized by the court. "*It is clear that in ascertaining the present value we are not limited to the consideration of the amount of the actual investment. If that has been reckless or*

improvident, losses may be sustained which the community does not underwrite. As the company may not be protected in its actual investment, if the value of its property be plainly less, so the making of a just return for the use of the property involves the recognition of its *fair value* if it be more than its cost. The property is held in private ownership and it is that property, and not the original cost of it, of which the owner may not be deprived without due process of law. But still it is property employed in a public calling, subject to governmental regulation and while under the guise of such regulation it may not be confiscated, it is equally true that there is attached to its use the condition that charges to the public shall not be unreasonable. And where the inquiry is as to the fair value of the property, in order to determine the reasonableness of the return allowed by the rate-making power, it is not admissible to attribute to the property owned by the carriers a speculative increment of value, over the amount invested in it and beyond the value of similar property owned by others, solely by reason of the fact that it is used in the public service. That would be to disregard the essential conditions of the public use, and to make the public use destructive of the public right. The increase sought for 'railway value' in these cases is an increment over all outlays of the carrier and over the values of similar land in the vicinity. It is an increment which cannot be referred to any known criterion, but must rest on a mere expression of judgment which finds no proper test or standard in the transactions of the business world. It is an increment which in the last analysis must rest on an estimate of the value of the railroad use as compared with other business uses; it involves an appreciation of the returns from rates (when rates themselves are in dispute) and a sweeping generalization embracing substantially all the activities of the community. For an allowance of this character there is no warrant."

Besides the constitutional provisions relating to the protection of property and its enjoyment, in the application of which the law with regard to fair value was principally developed, there must be considered the results of regulation in this State during

the past years (and in other jurisdictions for a varying number of years), because such regulation involves the interpretation and enforcement, in behalf of investors, patrons and public, of their reciprocal rights and obligations, in all branches of the public utility business.

Under the Public Service Commissions Law, the Commission is vested with authority to supervise and regulate service, rates, capitalization and accounts. These matters are intimately related, and the soundness and the success of governmental regulation of public service industries depend upon an equitable policy consistently applied to each one of these vital phases. Hence, there may be discerned in all the provisions with respect to these matters, and in the judicial interpretations of their scope and intent, an underlying conception of fairness and reasonableness in the treatment of the utilities, their investors and their patrons.

THE PURPOSES OF THE UNIFORM SYSTEM OF ACCOUNTS

One of the greatest sources of abuse in public utility enterprises was the inaccuracy, untruthfulness and secrecy of the records of financial transactions, by which service and rates to the community were controlled. Accordingly, the Public Service Commissions Law, by section 66 (relating to gas corporations) conferred upon the Commission the power to prescribe a uniform method of keeping accounts, records and books to be observed. On December 8, 1908, the Commission adopted the uniform system of accounts applicable to all gas corporations, and the requirements of such system of accounts have been held to have the force of law. *People ex rel. Kings County Lighting Co. v. Straus*, 178 App. Div. 840. The theory of this system of accounts was to compel the maintenance of true records of actual costs, showing at all times the actual expenditures for capital purposes and for operating purposes and the revenues from the conduct of the business, in order that the investor may be safeguarded in his original investment and that the operators of the utility may be governed by actual and not fictitious requirements. In

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its annual report to the Legislature for the year 1908 (Vol. 1, 395, 404, 405) the Public Service Commission for the First District set forth the reasons and basic principles of the Uniform System of Accounts for public service corporations, and of its bearing upon the integrity of investment made in the service of the public. The Commission said, in part: "These requirements mean that every charge to capital account shall represent 100 cents on the dollar in money actually spent in creating the property of the corporation. When \$100 par value of stocks or bonds are exchanged for \$75 worth of materials or machinery, there is obviously no propriety in charging capital account with \$100 to be carried as a permanent asset. The same holds true when the corporation sells securities at a discount or pays a commission to bankers for floating a loan — the asset to be capitalized is not the \$100 par value of the paper but the \$95 or \$97 received in actual cash. This system of accounting requires every entry in a capital or other account to represent actual cash or cash value, and this ensures that money spent, not securities issued, shall measure the cost of the investment. Of course, provision has been made for the charging to capital of legitimate organization costs, such as fees for incorporation, counsel fees and expenses for preparing and distributing prospectuses; likewise for engineering expenses, legal charges, taxes, interest, injuries and damages during construction. But there is to be no padding or inflation beyond reasonable cost. The far reaching effect of the establishment of such principles can hardly be overestimated. The investor will be given a guarantee that he has never had before, for one of the things which have worried him most has been the fear that the capital of the company would be impaired and his investment rendered of little value. Any system of accounts that can be devised will not prevent impairment absolutely, but it may go a great way in that direction. The removal of such risk not only will attract capital, but will lead to obtaining of capital at a lower rate. When the investor himself must provide against depreciation out of the interest or dividends he receives, he naturally demands a higher rate of

return than if he knows of a certainty that the corporation itself has already made ample provision. In other words, if the investor has demanded a return to him of 10 per cent for the capital supplied and has had to run the risk of finding his capital impaired after a time, he will be content to receive less than 10 per cent when an ample amortization fund has been accumulated. If the annual amortization charge is 3 per cent and it was not set aside when 10 per cent was paid, he will be equally well off with a 7 per cent payment when that 3 per cent has already been taken out and kept with the company. In fact, less than 7 per cent will attract him, because of the removal of uncertainty. This inures to the benefit of the public as well as to the company."

Accounting regulations of the Interstate Commerce Commission, which are substantially followed by this Commission, are formulated to afford necessary data for determining the value of the property that is employed in the public service and the current cost of carrying on that service. *Kansas City Southern Ry. Co. v. U. S.*, (1913) 231 U. S. 423.

THE NEW YORK STATUTE AND DECISIONS

Another important phase directed to the maintenance and integrity of investments in public utilities lies in the authority given to the Commission to regulate the issuance of securities, and in those provisions is seen clear intent of the Legislature to give a special consideration to original investment and actual expenditures. In *People ex rel. Del. & Hudson Co. v. Stevens*, 197 N. Y. 1, 9, the Court of Appeals said: "For a generation or more the public has been frequently imposed upon by the issues of stocks and bonds of public service corporations for improper purposes, without actual consideration therefor, by company officers seeking to enrich themselves at the expense of innocent and confiding investors. One of the legislative purposes in the enactment of this statute was to correct this evil by enabling the Commission to prevent the issue of such stock and bonds, if upon an investigation of the facts it is found that they were not for the

purposes of the corporation enumerated by the statute and reasonably required therefor."

In recognition of "the settled policy of the State" and "the interpretation to be given to both the original and amended statutes," the appellate court has held that the provisions of the Public Service Commissions Law limiting the purposes for which new securities may be issued extended even to the refunding of securities which had been issued prior to the enactment of the Public Service Commissions Law and that the same safeguards and restrictions which covered new investments also applied to securities issued prior to the Public Service Commissions Law, the court saying it must be proved "that the securities sought to be refunded represented actual investments for the company's capital account." *People ex rel. Dry Dock, etc., R. R. Co. v. Public Service Commission, 1st Dist., 167 App. Div. 286, 308, 309.*

Also, the requirements in the uniform system of accounts, relative to the amortization of capital, are directed to the safeguarding of investment. The reserve for that purpose to be made by the public utilities, and which it is their duty and right to make and to exact from consumers through sufficient charges must be determined upon the "cost" of the property, and not the value thereof which may fluctuate from time to time. In other words, in the case, for example, of mains, the depreciation reserve for which consumers pay, is to be sufficient to amortize the original cost of the mains or to replace them with mains or other property of equal cost at the expiration of their life, and not to amortize any increased value which they may acquire through fluctuation in the market price of mains at the expiration of their life.

It is now the established policy of the State of New York, which the regulation by the Commission is designed to effectuate, to discourage competition in public services enterprises, and this policy has regard to the conservation of the legitimate value of investment in such enterprises no less than to the public welfare involved in the maintenance of adequate service at reasonable rates.

"CAPITAL ACTUALLY EXPENDED"

The Public Service Commissions Law itself, section 72, in setting forth the matters to be considered by the Commission, among other things, in determining the reasonableness of a rate, particularly emphasizes the consideration of the investment in the property of the utility.

The importance attached by the Legislature to "capital actually expended," is in accord with the entire theory and scheme of the Public Service Commissions Law in relating the reciprocal rights and obligations of the public and consumers to the reasonable, necessary and proper investment for adequate service to the public. Consistently with the recognition of those reciprocal rights and obligations upon a basis which seeks to safeguard investment representing capital actually expended, there is a necessary implication that the utilities, on their part, will demand of the public no greater compensation for service, by way of rates, than a reasonable remuneration for the use of the reasonable, necessary and proper contribution of their capital for adequate service to the public. Value for rate-making purposes cannot be said to be fair to the utilities and the patrons alike which does not fully take into account the safeguards and assurances which the public, under the system of regulation, extends to investors under an advanced policy of adjusting the relations between public service corporations and the public. The policy is founded upon the highest conception of what is fair between the utilities and the public, and that is, in essence, always involved in the determination of fair value as a rate base. On this proposition, there are a number of recent examples.

THE "REPRODUCTION COST" OF GAS MAINS

The claim by a public service company to an allowance in a rate valuation for a sum equal to the cost of restoring pavements laid subsequent to the installation of mains and service pipes where such cost had not been actually paid out by the utility, has been denied by the New York Court of Appeals in this State

(People ex rel. Kings County Lighting Co. v. Willcox, 210 N. Y. 479, 494, 495), notwithstanding that in the Consolidated Gas Case, 157 Fed. Rep. 849, such an allowance was made by the Circuit Court and that the Appellate Division of the Supreme Court, in making an allowance for the cost of restoring pavements laid subsequent to the installation of mains and service pipes, felt bound by the decision of the Circuit Court in the Consolidated Gas case. The Court of Appeals, in discussing the question, held: "The relator is entitled to a fair return on its investment, not on improvements made at public expense."

This ruling was followed by the United States Supreme Court in Des Moines Gas Co. v. City of Des Moines, 238 U. S. 153, 171.

"INVESTMENT" AS BASIS FOR "GOING VALUE"

Investment is the principal consideration in the justification for an allowance for "going value" in a rate case. People ex rel. Kings County Lighting Co. v. Willcox, 210 N. Y. 479, 490-492.

The Court of Appeals summed up its attitude at that time towards the "cost-of-reproduction" rule and the importance to be attached to "investment," in the following statement: "The cost of reproduction less accrued depreciation rule seems to be the one generally employed in rate cases. But it is merely a rule of convenience and must be applied with reason. On the one hand it should not be so applied as to deprive the corporation of a fair return at all times on *the reasonable, proper and necessary investment made by it to serve the public*, and on the other hand it should not be so applied as to give the corporation a return on improvements made at public expense which in no way increase the cost to it of performing that service."

FAVORABLE DECISIONS OF THE APPELLATE DIVISION

The original cost of property as a controlling factor in a rate base has been approved by the Appellate Division of the Supreme Court of the First Department, and that part of its decision has

not been modified or reversed. In the case of *Mayhew v. Kings County Lighting Company* decided by the Public Service Commission for the First District (Matter of *Mayhew v. Kings County Lighting Co.*, 2 P. S. C. R. 1st Dist. N. Y. 659) the Commission fixed a rate for gas to be charged by the Kings County Lighting Company. In that case an appraisal was made of the physical property. The engineer for the Commission took the "net cost" of the physical property, which represents the estimated expense for labor and materials, exclusive of land and such supplies as are included in working capital." The estimate made by the Commission's engineer was considered by the Commission too low, because adequate allowance had not been made for various "expenses" connected with the construction of mains and service, but the Commission fixed the "net cost" after increasing the estimate of its engineer by the allowance which had been omitted by him. The Commission obtained "the cost to reproduce the property as new" by adding to net cost (which, it said, "covers only the cost of labor and materials, including sub-contractors' profits when proper") certain percentage allowances for engineering, supervision, contingencies, incidentals and general contractor's profit.

When the decision of the Commission in the Kings County Lighting Case was subjected to review in the Appellate Division of the Supreme Court, upon a writ of certiorari, that tribunal, while overruling the Commission on certain questions as to going value, pavement over mains and increment of land value, sustained the decision of the Commission in all other respects. *People ex rel. Kings County Lighting Co. v. Willcox*, 156 App. Div. 603, 617, saying: "We are of opinion that upon the other matters going to make up the item of *capital invested* upon which a fair and reasonable return is to be calculated, the decision of the Commission is right." Although an appeal was taken to the Court of Appeals, no exception was taken by the company to this holding by the Appellate Division, which remains unmodified by any subsequent decision.

In overruling the exception of the gas company to the deduc-

tion by the Commission of depreciation from the calculation of the value of the property new, the Appellate Division, even as the Court of Appeals subsequently did in the same case, pointed out that the method of valuation by estimating the reproduction cost was a method of convenience merely and was not controlling.

PROCEDURE IN THE "BROOKLYN EDISON" CASE

In *Moritz v. Edison Electric Illuminating Company of Brooklyn*, 7 P. S. C. R. 1st Dist. N. Y. 175, this Commission used the same method of determining the present value of the property of an electrical utility as it had employed in the Kings County Lighting case and as had received the express approval of the appellate court. The Commission, however, limited this time the overhead and intangible allowances to those shown by the company's records to have been incurred for capital account. The property of the electrical company was appraised by the engineer of the Commission at \$20,595,000, to which the Commission added for organization expenses, \$100,000, upon the basis of the record, and for working capital, \$1,000,000, fixing the approximate value at \$21,700,000. The company, however, contended that the valuation to be placed on its property should be \$38,822,000, or about \$17,000,000 to \$18,000,000 more than the amounts first mentioned. To the extent of 65 to 70 per cent of the material and labor cost of the property, the values given by the engineer of the Commission were taken from the vouchers or other records of the company, and for the remainder, the cost prices were estimated. *To the figures thus submitted by the engineer of the Commission, the company offered no objection, although it made its appraisal in co-operation with the engineers of the company, excepting that the company claimed a greater value for its land than the original cost and also additional allowances for overheads and certain intangibles.* The engineer of the Commission thus based his appraisal upon the cost of the existing property. The reduced electric rates prescribed by the Commission for that company have been put into effect without legal contest.

**ADVANTAGES OF THE "ACTUAL COST" METHOD UNDER THE
UNIFORM SYSTEM OF ACCOUNTS**

In Matter of Seven-Cent Fares for the New York & North Shore Traction Co., decided by this Commission on January 10, 1918, an application had been presented to the Commission on the model basis made possible by the modern plan of regulation. The company's franchises had been obtained, the requisite certificates granted, the line built, its securities authorized and issued, its finances and operations conducted — all under the scrutiny and supervision of the Commission. "In consequence," as was pointed out in the opinion of Commissioner Whitney, "it was possible, with little difficulty, to present the petitioner's property costs, operating statistics, revenue needs, and the like, with complete fairness and clarity. Cross-examination disclosed only two or three inconsequential items of variance, and the advantages gained from compliance in good faith with the requirements of the uniform system of accounts were manifest at every stage of the proceeding. Proof of the elements of the value of the property for rate purposes was thus available in compact and convincing form."

It also appeared, as stated in the opinion in the case, that "before the Commission sanctioned, on March 8, 1912, the bond issue and supporting mortgage, the books and vouchers of the petitioner and the two construction companies which built each portion of the road were carefully scrutinized. The Commission certified the items which it regarded as properly chargeable to capital account, and the company altered its books accordingly. Subsequent additions have been likewise under the scrutiny of the Commission. Thus the amount reported by the company as fixed street railway capital fairly represents the actual cost of the plant and property as determined by the Commission after a thorough examination, and inasmuch as these records of actual outlay are available, they constitute, when taken in connection with accrued depreciation, the preferable basis for determining present value for the purposes of this proceeding (People ex rel.

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Kings County Lighting Co. v. Willcox, 156 App. Div. 603, 611; 210 N. Y. 479), and are so tendered by the company."

Concerning the nature and basis of the company's right to a "fair return," the opinion said: "By way of compensation for fulfillment of these quasi-public obligations, the corporation is entitled to have, and is entitled to have the Commission vouchsafe to it, a rate of payment by the company's patrons sufficient to make possible permanency of efficient operation and to yield a reasonable return upon the property value represented by the unimpaired investment. * * * A public service corporation must have a revenue sufficient, not only to operate and maintain the property, but also to give a reasonable return to those whose invested money remains in the enterprise. This is necessary in order that investors may feel that they can put their money into public service projects and keep their investments therein with fair assurance of its earning power under proper management."

Upon the basis of these records of "actual outlay," taken in connection with accrued depreciation, the Commission found the "fair value" of the property for rate purposes and reached the conclusion that the existing fare of five cents failed to afford a reasonable return thereon. This convenient and accurate method of ascertaining "fair value" was used and urged by the company, and was deemed a natural consequence of the completeness of the company's records and the Commission's supervision of all its operations.

DECISIONS OF REGULATORY COMMISSIONS

Finally, the trend of decisions by regulatory commissions in the determination of reasonable rates and the base thereof preponderates in favor of giving controlling weight to the investment and original cost determined by actual data from reliable sources. Matter of Rates and Service in County of San Diego, Cal., 2 Cal. R. C. 464, 510, 512; Matter of Cripple Creek Water Co., Colo. P. U. R. 1916 C 788; Matter of Fares of Connecticut Co., Conn., decided March 7, 1912, 1 Whitten on "Valuation of Public Service Corporations," 101, 102; Butler v. Lewiston, A. & W. Street R. Co., Me. P. U. R. 1916 D 25; Matter of Blue Hill

Street R. Co., Mass. P. S. C. P. U. R. 1915 E 370, 379; Bay State Rate Case, Mass. P. S. C. P. U. R. 1916 F 221; Matter of Rates Mo. Southern R. Co., Mo. P. U. R. 1916 C 607; Lincoln v. Lincoln W. & L. Co., Ill. P. U. R. 1917 B 1; Comm'l Club v. Citizens' Gas & Fuel Co., Ind. P. U. R. 1916 E 1; Matter of Middlesex & Boston Ry. Co., 2d Rept. Mass. P. S. C. 111, 112; Fuhrmann v. Cataract Power & Conduit Co., N. Y. 2d Dist. N. Y. 3 P. S. C. 2d Dist. N. Y. 656, 691; P. S. C. v. Pac. T. & T. Co., Wash. P. U. R. 1916 D 947; Rept. of N. H. P. S. Commn. on an Investigation of R. R. Rates, Nov. 30, 1912, pp. 302, 303, 2 Whitten on "Valuation of Public Service Corporations," 919, 920; Bluefield v. Bluefield W. & I. Co., W. Va., 1917 P. U. R. E 22; Matter of Advance in Rates, Western Case, 20 I. C. C. 307, 337-347; City of Appleton v. Appleton Water Works Co., Wis. 5 W. R. C. R. 215, 219.

THE PRESENT BASIS OF DECISION

In the instant case before the Commission, the investigation has extended, not only to investment and original cost, but to every element of property right, operating expense and revenue which courts have determined or which experience has shown should be considered in determining reasonable rates upon the basis of the fair value of the property devoted to the public service. Due weight has been given by the Commission to each element without insistence upon this or that arbitrary or artificial rule of thumb, to the end that from all of the evidence, in the light of the Commission's own thorough and expert knowledge of the electric business and costs of public utility properties during the ten years in which the plant, wires and equipment of this company have been largely built or replaced, the Commission might determine, under all the facts and circumstances of the case, what is the fair amount, as a just and equitable legal basis for the rates of this company, upon which the fair return allowable to this company is to be computed and "due regard" given to the amount of "capital actually expended" for the property.

Opinion estimates of "reproduction cost" have not been

rejected, but have not been accepted as solely controlling, especially where actual data as to this company is available.

PROPERTY AND INVESTMENT DEVOTED TO ELECTRICAL BUSINESS

As the Flatbush Gas Company distributes and furnishes both gas and electricity, it necessarily has investments in property which is used exclusively either in gas service or electric service and also in property which is used jointly in both services. This necessitates, as to the latter, for the purposes of this proceeding, an apportionment of some of this property to the requirements of the electric business. We are not, however, concerned here with the determination of any questions relating to the investment in the property devoted to the gas business, as the reasonableness of the gas rates is not within the purview of this investigation. The price at which the Flatbush Gas Company supplies gas (to wit, eighty cents per 1,000 cubic feet) is the same as that charged by the Brooklyn Union Gas Company (which controls the Flatbush Gas Company through stock ownership), and was fixed by act of the Legislature itself. Laws of 1906, chap. 125.

Although the greater portion of the property used in its electrical operations has been installed since the establishment of the Public Service Commission and its accounting system in 1907, the financial history of the company dates back to April, 1864, when it was incorporated under the act of 1848 authorizing the formation of gas-light companies. On December 18, 1893, the company filed an amended certificate of incorporation, extending its purposes and powers "to the manufacturing and using of electricity for producing light, heat and power in lighting streets, avenues, public parks and places, and public and private buildings of cities, villages and towns within the State of New York."

Immediately thereafter the company acquired, for the sum of \$15,000, the "property, rights, franchises and privileges" of the Knickerbocker Electric Light and Power Company, which was merged with the Flatbush Gas Company.

As to the Knickerbocker Company, it appears that in July, 1893, it obtained from the Flatbush town board a franchise for

the supply of electricity, and that it had \$30,000, par value, of capital stock outstanding. The record does not disclose that the Knickerbocker Company had any property other than this franchise or that it had made any payment to a government authority in consideration for or on account of the franchise which it sold to the Flatbush Gas Company for the sum of \$15,000.

FRANCHISES

The Knickerbocker franchise of July, 1893, permitted electrical operation only within the town of Flatbush. In 1894, the town of Flatbush was annexed to the city of Brooklyn, and is now known as the twenty-ninth ward of that borough. On January 1, 1898, the city of Brooklyn was consolidated with the other boroughs into the city of Greater New York.

Under a contract with the department of parks of the then city of Brooklyn, dated January 2, 1896, the Flatbush Gas Company supplied current for street lighting on Ocean Parkway, which is outside of the territorial limits of the Knickerbocker franchise, and on August 4, 1897, the Flatbush Gas Company entered into a new contract with the park commissioner, requiring it to remove its poles from Ocean Parkway and to place the wires and other transmission equipment in a subway. This new agreement, while binding the Flatbush Gas Company to place in the conduit all wires necessary for lighting Ocean Parkway and wire necessary "for supplying electric current to such public or private consumers as the company may desire," was held by the Court of Appeals (*People ex rel. The Flatbush Gas Co. v. Coler*, 190 N. Y. 268) not to constitute a valid franchise and, therefore, not to confer upon the company any legal authority to supply current to private consumers along Ocean Parkway. It later was found that the company was operating its electric business outside of the twenty-ninth ward at several points in addition to Ocean Parkway. Thereupon the company withdrew from the streets illegally occupied by it, and thereafter applied for, and on December 21, 1909, secured, a franchise from the city of New York, authorizing the company to supply current for both public

and private purposes within a described limited territory on either side of Ocean Parkway between Foster avenue and the Atlantic ocean. The new grant was for a period of twenty-five years from December 17, 1907 (the date on which the Court of Appeals had decided that the company had no valid franchise right on Ocean Parkway), with the privilege of renewal for a further period of twenty-five years upon a fair revaluation of the franchise.

CAPITALIZATION

The original charter of the Flatbush Gas Company, of 1864, provided for the issue of \$40,000 par value of capital stock. The authorized amount was increased in 1868 to \$55,000, in 1889 to \$110,000, in 1892 to \$150,000, and in 1893 to \$200,000. During 1890-1891 the company issued \$55,000, face value, of its first mortgage twenty-year 5 per cent bonds, and between May, 1894, and July, 1896, the company, from time to time, disposed of an issue of its second mortgage 6 per cent bonds, aggregating \$135,000, face value.

The latest increase in its capitalization, by the issue of \$50,000 capital stock and \$135,000 of second mortgage bonds, was apparently necessitated by the company's entrance into the electrical business. However, these issues marked the Flatbush Gas Company's last call for outside capital, for on May 31, 1897, it became a member of the system of the Brooklyn Union Gas Company, which acquired, at a price of \$372,771, all of the \$200,000 of outstanding stock of the Flatbush Gas Company. The gas company then discontinued its usual dividend of eight per cent on its stock, and since then all its net earnings from electric service have been reinvested in the property. The earnings of the Flatbush Gas Company have since been consistently supplemented by "advances" by the Brooklyn Union Gas Company, through which the former was enabled to retire its first mortgage bonds in 1911 and its second mortgage bonds in 1914, so that it has now no funded debt outstanding. These "advances" were made in cash only in rare instances, and were made available to the electric department rather indirectly. As a member of the Brooklyn

Union system, the Flatbush Gas Company has been receiving its gas supply from the parent company. The revenue derived from its sale to consumers has not been primarily applied to reduce the liability to the Brooklyn Union Company for this gas, but generally has been retained and applied first to its own capital purposes, for the electric as well as the gas department.

This virtual merging of the gas and electric departments and the failure properly to allocate between the two departments the charges for interest on outstanding debt and Brooklyn Union Gas Company advances, render difficult the separate presentation of the whole financial status of the electric department. Taking, however, the electric plant and construction alone, the book values shown on the balance sheet of December 31, 1916, are as follows:

BOOK VALUE DECEMBER 31, 1916 — ELECTRIC CAPITAL

Fixed capital — electric	\$1,648,401	21
Fixed capital — general	85,418	49
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Total before deducting depreciation.....	\$1,733,819	70
Less accrued amortization of capital.....	664,114	23
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Total after deducting depreciation.....	\$1,069,705	47
<hr/>		

Not all of the "general" fixed capital is, of course, used in electric operations, but, from the evidence given by the Commission's engineers who have examined the use made of each building and parcel of land and apportioned the cost on the basis of utilization by the two departments, it appears that by a relatively unimportant correction in this item, it should be reduced approximately \$7,000.

With the exception of \$50,000 derived from the sale of stock, the requirements of all of this investment outlay have been met, either out of the earnings of the Flatbush Gas Company or out of advances made by the Brooklyn Union Gas Company.

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INVENTORY OF PROPERTY

The company's books of account were examined by the Commission's accountants for the ascertainment of the complete financial history of the company since its commencement of electrical operations, and transcriptions of these records, embodied in analyses and summaries, were placed upon the record in this proceeding. It must be said, however, that the accounting methods, particularly those followed by this company as well as by others, prior to the promulgation of the Commission's uniform system of accounts for electrical corporations in 1908, were faulty and, without analysis and readjustment of entries, were misleading in their accounting for property investment. An egregious example of such faultiness in accounting is the failure to write off machinery or apparatus when it wore out or ceased to be useful, such as is disclosed in Exhibit 20 (May 13, 1913) containing an analysis of the book value of electric construction in 1902, made by the then general manager of the company, which may be summarized as follows:

Book value on December 31, 1902.....	\$341,223 39
Less stock on hand	\$2,148 75
Discontinued or superseded prop- erty	58,918 20
	<hr/> 61,066 95
Resulting values new.....	\$280,156 44
Depreciation	40,029 07
	<hr/>
Calculation of then present value.....	\$240,127 37
	<hr/> <hr/>

Notwithstanding that of plant construction, machinery, poles, etc., which had cost \$341,223, not less than \$58,918 had already been discarded in the first ten years of operation, as shown by the foregoing analyses by the company's general manager, no change in bookkeeping practice regarding retirements of property was effected until about six years later (that is, in 1908)

when this Commission established the accounting regulations prescribed by the uniform system of accounts.

Besides the accounting investigation, engineers of the Commission, under the direction of Clifton W. Wilder, its electrical engineer, made an inventory of the existent property devoted to the company's electrical business, and examined into its physical condition, actual cost and present value. The property in existence on December 31, 1912, was inventoried and appraised, principally upon the basis of the company's records of costs, at fair average prices for a period of years preceding the appraisal, to which were added percentages, varying with the different items of construction, to cover contingencies and incomplete inventory. The appraisal of 1912 was subsequently brought down to date as of January 1, 1917, so as to reflect the additions and retirements during the interval of 1913-1916 and was revised to conform to the company's cost of materials and labor entering into the property inventoried, as ascertained by a fuller examination and analysis of the vouchers and records of the company, thus furnishing, as completely as could be had, an appraisement of the property upon the basis of original cost and investment outlay. More than three-fourths of the property now in existence has been installed during the past ten years, throughout which period the company's operations and accounts were under the regulation and supervision of the Commission. There were some instances as to which the ascertainment of cost was doubtful or the allocation between gas and electrical services disputable, but the Commission's engineer appears to have given a generous figure for actual cost to the company.

The results as to *tangible property* as of January 1, 1917, appear in the attached exhibit, table I.

Adding to the inventory cost of tangible property the cost of intangibles as revealed by the books and records of the company (that is, \$22,679), there is obtained the following comparison, table II.

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TABLE I — TANGIBLE PROPERTY

APPRAISAL OF THE FLATBUSH GAS COMPANY ELECTRIC DEPARTMENT AS OF JANUARY 1, 1917: SUMMARY SHOWING COST, ACCRUED DEPRECIATION AND COST LESS DEPRECIATION

<i>Property in Use</i>				
Account	Cost	Accrued depreciation	Cost less depreciation	
E 110 Land devoted to electric operations	\$35,161	.....	\$35,161	
E 121 General structures	52,802	\$19,757	33,045	
E 122 General equipment	25,710	8,686	17,024	
E 132 Power plant buildings	36,942	7,977	28,965	
E 141a Furnaces, boilers and accessories	70,470	26,167	44,303	
E 141b Steam engines	127,402	48,829	78,573	
E 144a Electric generators	44,770	18,822	25,948	
E 144b Accessory electric power equipment	33,597	10,881	22,716	
E 145 Miscellaneous power plant equipment	781	235	546	
E 161 Poles and fixtures	39,893	17,691	22,202	
E 162 Underground conduits	330,898	51,976	278,922	
E 164 Distribution system	178,235	24,297	155,938	
E 165 Line transformers and devices..	53,960	12,639	41,321	
E 166 Electric services	295,753	63,388	232,365	
E 167a Electric meters	108,177	32,992	75,185	
E 171 Municipal street lighting system (Elec.)	156,609	49,998	106,611	
E 175 Electric tools and implements..	895	441	454	
E 176 Electric laboratory equipment..	3,857	1,391	2,466	
E 286 Miscellaneous construction expenditures	2,050	347	1,703	
Total	\$1,597,962	\$396,514	\$1,203,448	
<i>Property not in Use</i>				
E 166 Curb services	12,925	3,758	9,167	
Grand total	\$1,610,887	\$400,272	\$1,212,615	

NOTE.—If assessed value is to be used instead of cost of real estate, a figure of \$36,890 should be substituted for the figure \$35,161 given above. The total and grand total for the column headed "cost" will then become \$1,599,691 and \$1,612,616 respectively and the total and grand total for the column "cost less depreciation" will then become \$1,205,177 and \$1,214,344 respectively.

TABLE II — TANGIBLE AND INTANGIBLE PROPERTY

	Company's book cost	Commission's engineer's in- ventory cost
Tangible electric property.....	\$1,589,773 31	\$1,497,214
(Land and "general" excluded)		
Land and "general" capital.....	121,367 62	113,673
	<u>\$1,711,140 93</u>	<u>\$1,610,887</u>
Franchise	\$15,750 00	
Legal expenses	1,878 77	
Engineering	5,050 00	22,678 77
	<u>22,678 77</u>	<u>22,679*</u>
Total	\$1,733,819 70	\$1,633,566
Accrued depreciation	664,114 23	400,272
	<u>\$1,069,705 47</u>	<u>\$1,233,294</u>

It will be observed that the discrepancy in 1902 of \$58,918.20 between the book cost of the property and the value shown by the general manager's analysis, had grown by the end of 1916 to \$92,559 — the difference between book cost and inventory cost of tangible electric property shown on table II. The company has, however, reserved out of earnings from rates the sum of \$664,114.23 for accrued depreciation, whereas the accrued depreciation computed by the electrical engineer of the Commission amounted to only \$400,272. This excess in reserve is of course to be regarded as sufficient to absorb the difference between book cost and inventory cost due to the failure to write off retirements of property.

COMPANY'S APPRAISAL

The Flatbush Gas Company did not dispute the appraisal made by the Commission's engineers, showing the value of the tangible property as of 1912, but submitted evidence of an engineer employed by it for the purpose, who testified to his opinion of the value of certain intangible elements which he said should be added to that of the tangible property. Subsequently, the

*Book cost.

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company had an appraisal made as of December 1, 1916, to show what it claimed should be taken as the *reproduction-cost-new* of the physical property and of the intangible elements which it asserted should be added to the value by any appraisal. The purported appraisal of present fair value of the property thus presented by the Company did not include any finding or allowance for, or basis for computation of, accrued depreciation, and such appraisal was therefore incomplete and not an adequate basis for determining the fair value of the property. Minnesota Rate Case, 230 U. S. 352, 458; Knoxville v. Knoxville Water Co., 212 U. S. 1, 10, 13, 14. A valuation deduced from such an appraisal could not serve as a basis here. The appraisal as submitted by the company could not be accepted as proof of the present fair value of the property for rate purposes, and was hardly presented as such.

To the extent, however, that the estimate of reproduction-cost-new submitted by the company challenges the correctness of the Commission's engineer's appraisal of physical property new and his non-inclusion of various percentages for overheads and intangible elements, questions are raised which deserve and have received careful consideration, with the view of observing fully the principles, underlying the scheme of regulation in New York State, which seek the protection of the investor in his contribution of capital to the public service and the continuance of adequate service to the public at reasonable rates. I refer particularly to the questions which have been raised as to the location of the company's production plant, which entails higher operating costs than would be warranted in the case of a more advantageously located plant, and to the value of the service to consumers in view of the communal relation and geographical contiguity of the twenty-ninth ward of Brooklyn to the service areas in which an eight-cent rate is charged.

DIFFERENCES BETWEEN COMPANY'S "ESTIMATES" AND COMMISSION ENGINEER'S APPRAISALS FROM COMPANY'S OWN DATA

The following comparison shows the principal differences between the "opinion estimates" of reproduction-cost-new sub-

mitted by the company's witnesses and the actual cost new as disclosed by the company's records and reported by the Commission's engineers:

TABLE III

	Actual costs found by Com- mission's staff examinations	"Estimates" by company's engineers
Labor and material — electric	\$1,418,994	\$1,521,151
General — portion of land, general structures and general equipment..	110,410	145,853
Incandescent lamps, meter and trans- former installation, etc. ....	.....	44,709
Contingencies and incomplete inven- tory.	81,483*	155,323
Construction overheads .....	.....	252,012
Total structural cost.....	\$1,610,887	\$2,119,048
General overheads . . . . .	.....	148,330
Cost of assembling capital .....	.....	71,321
Interest during construction .....	.....	97,948
Going concern value .....	.....	130,000
Working capital .....	.....	110,000
Total reproduction cost.....	.....	\$2,676,647

As already pointed out, the company's valuation consists entirely of an "opinion" estimate of supposed reproduction-cost-new. The unfairness of adopting in its full significance this method of appraisal, in view of the rise in market prices of materials and labor, apart from other difficulties in financing the establishment and inauguration of a large public utility enterprise, due to the disturbances in all relations wrought by the

* Obtained by eliminating from each item in the appraisal that amount supposedly included therein, for contingencies and incomplete inventory. The percentages employed are to be found in Exhibit 5, 1917 series.

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world war, is conceded by the company itself, and no claim is made for acceptance of reproduction cost figures except upon a basis of pre-war prices. Nevertheless, in attempted justification of details of the appraisal, there was obvious resort to the enhanced war prices.

There was a studied and purposed avoidance, by those in charge of the company's valuation, of resort to the company's own original cost records in estimating costs and values of the items of its property, although great reliance was placed upon information as to values and properties in other localities. In one instance, large use was sought of a report made by an engineer employed by a railroad distant from the vicinity of the Flatbush Gas Company's plant to value the railroad property. While an assistant engineer consulted the company's records for data as to subsurface structures not visible by superficial inspection, another assistant engineer "estimated" the material and labor requirements of a structural foundation which could not be ascertained and measured by open inspection, in order to be consistent, in avoiding resort to or reliance upon what the company's records actually showed. Another witness, who appraised probably one-quarter of the property for the company, and whose experience was diversified and attainments distinctive, and who evidently departed from the plan of valuation pursued by the others, testified that, wherever possible, he tested the correctness of his estimates in the light of the original cost records of the company, and that his estimates were generally within a small percentage of the original cost records. I do not at all impeach the veracity of the engineering witnesses called by the company, their ability, or the skill with which they performed their labors for it. The criticism expressed as to a few instances is designed, not as reflection upon them, but as illustration of the company's attempted method of appraisal by opinion rather than record fact.

A further condition which would militate against any adoption of the extreme reproduction-cost method in this case is the disadvantageous location of the company's plant and the resulting high operating costs, the proof of which is not traversed in the

record. Consumers may justifiably protest against the reproduction cost theory being so rigidly applied as to burden them with added cost of reproducing a plant which it would be unwise for any one ever to reproduce in its present location. The reproduction-cost method cannot be used for the intrenchment of error and perpetuation of loss due to misplanning an enterprise. But it is not necessary now to pass judgment upon the effect this consideration should have upon the conclusion reached in this proceeding. If the company be safeguarded in its return upon actual investment in existent property serving the public, the company will be treated with fairness.

Even abandoning its claim to use of the reproduction-cost-new valuation of physical property, and accepting the appraisal as made by the Commission's engineers, counsel for the company contends that the valuation of the tangible property should be increased by various allowances for overheads and intangible elements shown in the following summary (Table IV):

TABLE IV

Net cost of tangible property, other than land, January 1, 1917, as per Public Service Commission table	*\$1,575,726
Additions to tangible property six months ending June 30, 1917 (Exhibit No. 17).....	75,960
	<hr/> \$1,651,686
Contractor's profit, engineering, administration, contingencies and incidentals, 21 per cent....	346,854
	<hr/> \$1,998,540
Accrued depreciation as figured by Public Service Commission (corrected Exhibit No. 1).....	400,272
	<hr/> \$1,598,268

* This is Public Service Commission's estimate, \$1,610,887, less their value of land, \$35,161.

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Land, present value.....	\$62,412
	<hr/>
	\$1,660,680
Preliminary and development, 12 per cent.....	199,281
Working capital (Exhibit No. 12).....	141,500
	<hr/>
Total	\$2,001,461
The order of the Commission in the Kings County case was set aside for failure, among other things, to make an allowance for going concern value. That value has been estimated by the Messrs. Stone & Webster, very conservatively, at..	
	128,804
	<hr/>
Total upon which fair return must be allowed	<u><u>\$2,130,265</u></u>

Counsel for the company argues: “* * * that a subtraction for depreciation can be made only from cost of reproduction new. It is impossible to obtain the ‘accurate evidence as to actual value’ mentioned by Mr. Justice Clarke (People ex rel. Kings County Lighting Co. v. P. S. C., 156 App. Div. 511, quoted *supra*) and no attempt was made by the Commission or by the company to give this accurate evidence. The company proved the cost of reproduction new. This theory requires the use of percentages for engineering, superintendence, contractors’ profit, promotion, going concern and the like and this fact was made the leading objection to the theory by Mr. Commissioner Stevens in the Buffalo Gas Case, 3 P. S. C., 2d Dist., 553. The authorities in favor of the inclusion of these percentages are, however, overwhelming.”

Counsel quotes from various opinions to support this asserted preponderance of the authorities in favor of the inclusion of these percentages.

If these percentages are part and parcel of the valuation basis of reproduction new, then consistently the reproduction cost new valuation, rather than the unimpaired investment, should be taken

as the basis, as urged by the company. But, as previously pointed out, the omission of any allowance for depreciation in computing the value of the property renders the appraisal so incomplete as not to form a valid basis for rate-making. Nor would it be proper to take the valuation new found by the Commission's engineers, diminished by the accrued depreciation as computed by him, and then add thereto these claimed percentages for overheads and intangibles. Overhead charges for engineering, superintendence, and contractors' profit are to be allowed for, not as representing an ethereal value, but because they form an actual, even if undistributed, portion of the necessary and reasonable investment in the property. In a valuation based upon original cost, every expenditure which entered into the investment is, and should be allowed for. Beyond that, there is no more support for allowing for expenditures which might be incurred under the hypothesis of reproducing the plant than there is for varying the prices of constituent physical elements from those actually paid. The depreciation deduction calculated by the Commission's engineer was based upon the original cost of the property as found by him, and not upon an appraisal which includes overheads undisclosed by cost records but estimated by percentages. If the claimed overheads are to be added to the valuation, the calculation of depreciation must include the overheads which attach to the tangible property. Such a calculation cannot be made from the evidence in the record, and, hence, a valuation reached by taking the original cost new, less accrued depreciation as found by the Commission's engineer, and adding thereto reproduction-cost overheads without any deduction for depreciation corresponding with the depreciation of the physical items to which they are attached, is manifestly incomplete and insufficient. *Minnesota Rate Cases*, 230 U. S. 352, 457, 458.

OVERHEADS

A valuation of the property by the method of reproduction cost new without any deduction for depreciation, and a valuation by the method of original cost new less depreciation and the addi-

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tion of overheads calculated only by percentages, without depreciating the overheads, are alike unacceptable and unsound.

The question is still presented whether the omission of overhead allowances, in an amount claimed by the Flatbush Gas Company, does not render the appraisal of the Commission's engineer incomplete.

The company claims an allowance of \$546,135 (a) for contractor's profit, engineering, administration, contingencies and incidentals, estimated at 21 per cent of the valuation new of the tangible property, or \$346,854, and (b) for preliminary or development expense estimated at 12 per cent of the resulting amount after adding 21 per cent to the tangible value and deducting a lump sum for depreciation, or \$199,281. This allowance represents about one-third of the inventory cost found by the Commission's engineer.

The views expressed in the opinion of the Public Service Commission for the Second District, in *Matter of Rates of Glen Telephone Co.*, 4 P. S. C. R. 2d Dist. N. Y. 723, as to the fairness and soundness of hypothetical overhead expenditures, are well applicable to the present discussion: "If the books of the company have been carefully kept and show all the expenditures which it has made from the time it began business, what better evidence is there of the moneys which it has spent in building up its business? Are not the actual figures in such a case better than any figures based upon theory? Is the company to be given the benefit of a highly inflated value upon its property merely because such a value can be worked out upon the theory of a reproduction value regardless of what money has been actually invested in the property? The only answer to this proposition, in all fairness to the company as well as the public, is that unless it can be shown that the reproduction value is the one which should prevail, the book value must be a prominent factor in determining the investment of the company upon which the rates are to be founded, due regard being had to the other questions which the courts have decided must be considered in rate cases. To say that a company is to be permitted to include all kinds of theoretical expenses

which might be incurred in the reproduction of its plant for the purpose of determining the amount upon which rates are to be based, when in fact no such expenses have ever been incurred and the company has kept a reasonably accurate account of all its fixed capital expenditures, is neither fair to the company nor the public and ought not to be sanctioned."

Contractor's Profit.—The valuation as found by the Commission's engineers included the cost paid for work or materials furnished under contract, which, of course, covered the contractor's profit. Had the plant been built by a general contractor within the limited period presupposed in a reproduction of the property, the company would no doubt have had, in the contract price, the benefit of acquiring construction materials at wholesale prices, naturally lower than those paid by the company during the course of constructing its plant piecemeal. Having allowed for prices actually paid by the company in the process of piecemeal construction, year by year, there is no excuse for adding to the total cost of such work a hypothetical percentage that might have been paid under other and different circumstances. Indeed, the allowance for contingencies is made for the purpose of taking care of the unanticipated incidents in the process of constructing the plant appraised, rather than in a process of reproducing the plant with the knowledge of the contingencies which were actually encountered and which are reflected in the actual cost figures.

Engineering.—So far as disclosed by the records of the company, the cost of engineering in connection with the creation of its plant has been \$5,050. To allow the sum claimed by the company would be to substitute for actual outlay a purely hypothetical figure that might conceivably be operative under circumstances widely different from those experienced by this company, but is in this instance, at least, shown to be improper.

The argument is advanced that a public utility is entitled to earn a return upon all property which is the product of any expenditures of labor or capital, that the plant could not have been constructed without engineering plans and supervision, and that no matter whether the money was derived from investment or

from charges to consumers and whether the expenditures were accounted as capital charge or as operating expense, the property value created through the expenditure should be included in the valuation of the property upon which a rate is to be based. This argument has strict regard to formula, rather than reasons of fairness. The same argument would warrant the allowance for pavement over mains not paid for by the utility (*Consolidated Gas Co. v. Mayer*, 157 Fed. Rep. 849) but such an allowance has finally been held to be unfair. *People ex rel. Kings Co. Ltg. Co. v. Public Service Commission*, 210 N. Y. 479, 494, 495; *Des Moines Gas Co. v. Des Moines*, 238 U. S. 153, 171, 172. There is no proof that the claimed amount of expenditures was actually paid out for the specific purposes; on the contrary, they are claimed because it is estimated they would have to be made if the plant were reproduced under presently existing conditions. The argument, however, disregards the essential fact that when salaries for services here involved are included in operating expenses—as they have mostly been by the Flatbush Gas Company—they enter at once into the rate which is fixed on the basis of the expense accounts as now made up and before the Commission. Were these items now to be transferred to the construction account, the operating expenses to be allowed for in fixing a reasonable rate would be correspondingly diminished. Furthermore, the calculation of deficiency in earnings upon which is based the claim for “going value” would be incorrect for the entire period of operation. In fact, however, no advantage would accrue to the company in the final result of such a transposition. The application to the construction expenditures in 1914 and 1915 of the percentages for overheads, of which opinion estimates were submitted by the company, results in an annual average of approximately \$40,000. If this amount were deducted from expenses, the company would need to add to the property valuation for each of those years as much as \$460,000 in order to obtain at seven per cent an annual amount (after providing for depreciation) equal to what it now secures (that is, \$40,000) through the inclusion in operating expenses of the cost of engi-

neering and administration, etc. By accepting the accounts as they now stand, and rejecting the hypothetical outlays, no injustice will be done to the company or its investors.

Incandescent Lamps, Meter Installation, etc.—The foregoing disposition of certain charges made to operation applies equally to the company's claim for the inclusion in the valuation of \$32,852 for the cost of incandescent lamps which it has furnished to consumers. Such lamps are short-lived, and the uniform system of accounts prescribed by the Commission for electrical companies requires that their cost be charged to operation and not to capital. The company having correctly accounted for the cost, it would not be proper to treat it differently. *People ex rel. Kings Co. Ltg. Co. v. Pub. Serv. Commn.*, 178 App. Div. 840. Like fuel and supplies, they are considered as proper charges to expense and are consequently paid for by the company's patrons in the price charged for current. It would be manifestly unjust to require patrons to pay in addition a seven per cent return upon the unexpired value of these lamps.

Claims for relatively small amounts for meter installation, etc., fall within the same category. These questions are discussed more at length in the decision by this Commission in *Moritz v. Edison Elec. Illg. Co. of Bklyn.*, 7 P. S. C. R. 1st Dist. N. Y. 175, 203.

PRELIMINARY AND DEVELOPMENT EXPENSE

The company claims a further allowance of 12 per cent of present value, or \$199,281, for preliminary and development expense, citing as authority for these allowances as well as for others the precedent in the case of *Mayhew v. Kings County Ltg. Co.*, 2 P. S. C. R. 1st Dist. N. Y. 659; *revd.*, in part, 156 App. Div. 603; 210 N. Y. 479. The decision in the Kings County Lighting case was rendered by the former Commission before the definitive decision by the Appellate Division and the Court of Appeals with regard to the elements of fair value in rate-making. The Commission made no allowance for going value as such, but in the allowance for preliminary and development expenses and overheads embraced elements which the court held

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should be fully and separately allowed for in going value. The judicial exposition by the Appellate Division and Court of Appeals of the purpose and scheme of the Public Service Commissions Law in placing investment under continuous safeguards, whether in relation to capitalization, service, property entity and rates, qualifies the precedent of that decision in details not approved or disapproved by the court.

The New York Court of Appeals, in its opinion (210 N. Y. 479, 486, 487) as to "going value," said: "It takes time to put a new enterprise of any magnitude on its feet, after the construction work has been finished. Mistakes of construction have to be corrected. Substitutions have to be made. Economies have to be studied. Experiments have to be made, which sometimes turn out to be useless. An organization has to be perfected. Business has to be solicited and advertised for. In the case of a gas company, gratuitous work has to be done, such as selling appliances at less than a fair profit and demonstrating new devices to induce consumption of gas and to educate the public up to the maximum point of consumption. None of those things is reflected in the value of the physical property, unless, of course, exchange value be taken, which is not admissible in a rate case. The company starts out with the 'bare bones' of the plant, to borrow Mr. Justice Lurton's phrase in the Omaha Water Works Case (*supra*). By the expenditure of time, labor and money, it co-ordinates those bones into an efficient working organism and acquires a paying business. The proper and reasonable cost of doing that, whether included in operating expenses or not, is as much a part of the investment of the company as the cost of the physical property."

It is quite evident that the things included by the company's engineer in overhead expenses which are concomitant with labor and material expenditures are confused with things embraced in the allowance for "going value" as defined by the Court of Appeals. Moreover, the witness included in going value, as testified to by him before the New Jersey Public Utilities Commission, "practically all elements of value which the company may

possess outside of its actual structural value and the tangible worth or value of its quick assets." Going value as thus conceived by this witness embraces a great deal more than the elements included by the Court of Appeals.

So far as any "going value" has been proved to attach to the property of this company, under the decision of the Court of Appeals, the Commission of course should make full allowance. The proof upon this particular question is considered *infra*.

The cost of organizing a corporation under the general laws of this State is not large, and the necessary formalities at the time of the corporate formation of the Flatbush Gas Company and its predecessor were few. There is substantial expense attached to obtaining the necessary consents and local franchises for the use of streets and public places. The evidence shows that the company paid \$500 to the city of New York in 1909 for the local or secondary franchise on Ocean Parkway, which is outside the territory covered by the earlier franchise granted by the town of Flatbush. It does not appear that the town exacted any compensation from the grantee for the last-mentioned franchise, although it was transferred to the Flatbush Gas Company for a consideration of \$15,000. The outlay actually paid over to the public authorities as a consideration for the grant of the franchise is capitalizable (Public Service Commissions Law, §§ 55, 69, 101), and should also be allowed in the valuation. Had not the Flatbush Gas Company purchased the franchise, it would itself have incurred the necessary expense of prosecuting an application to the public authorities and publication of notices.

Aside from \$15,750 charged to "franchises" and \$5,050 charged as engineering, the only intangible electrical capital recorded on the company's books is \$1,878.77 for "legal expenses." All other legal expenses have been treated as operating charges, and as such do not require further consideration than has already been given to this category of charges.

The element of interest during construction differs from other supercharges that have been considered, in that interest is in no case treated as an operating expense. Nevertheless, this element

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enters into the rate charged if the necessary return to be provided by the rate is calculated upon a valuation adopted in this proceeding, embracing an amount of working capital sufficient to cover the cost of construction material and the amount of the expenditures made for uncompleted construction. In the case of a comparatively small company such as the Flatbush Gas Company, which owns much equipment but few and relatively small buildings, capital does not need to be advanced for any considerable length of time before it becomes revenue producing. Probably the longest period of idleness would be occasioned in the instance of capital invested in land, which is acquired somewhat in advance of the time of actual use. Were land taken into the rate base at its appreciated value, overhead expenses would not be allowable. *Minnesota Rate Cases*, 230 U. S. 352, 455. When, however, land is taken at cost, it would be fair to add thereto the incidental expenses of acquisition and carrying charges on the investment before it is utilized for production.

Including the franchise cost and treating going value as an element separate and independent from the preliminary and development expenses here discussed, an aggregate allowance of \$25,000 would amply cover the actual expenditures upon which a return should be calculated, in addition to the expenditures reimbursed to the company through inclusion in operating expenses or working capital.

"GOING VALUE"

In *People ex rel. Kings County Ltg. Co. v. Public Service Commission*, 210 N. Y. 479, 492, the Court of Appeals laid down the guide by which allowance for "going" value should be governed.

The evidence in support of the company's claim of \$128,404 for unearned return upon investment, tested by the essential requirements of the foregoing ruling by the Court of Appeals, is altogether insufficient to prove the claim.

Curiously, the company's computation from which we are to infer going value is inconsistent with the computation of the

value of its property, since charges which were claimed to have been incurred for capital purposes in estimating the property value are included in the operating expenses in computing income for purposes of sufficient return. The transposition of the charges from operating expense to capital account, to accord with the claims of the company in respect to property value, would have converted the asserted deficit to a surplus many years ago. The company's computation of going value failed to include interest on working capital and interest on accrued deficits, as compensating for failure to deduct depreciation from plant account. The return demanded was, however, to be sufficient to pay not only operating charges but also to provide a reserve for depreciation as well as profit upon the investment. The amounts involved in the attempt at balancing interest on working capital and accrued deficits against accrued depreciation are altogether out of proportion to each other. Had the computation included interest on working capital and interest on accrued deficits, but also deducted accrued depreciation from plant account, the deficit would have been reduced from \$128,000 to \$14,000 (without relieving operating expenses from excessive insurance reserves which are discussed later); while a continuation of the computation forward to June 30, 1917, shows a surplus of more than \$45,000. In other respects also, the company's computation is objectionable. Interest and depreciation reserve, for example, are figured annually upon the total investment at the close of the year; but, in the absence of proof as to the monthly expenditures, the return might just as plausibly be figured on investment at the beginning of the year. The method in general practice, and which fairly should be applied here, is to add to the investment at the beginning of the year an amount equal to one-half of the expenditures made during the year. If this method had been followed, the surplus would be increased by about \$85,000.

"ORIGINAL COST NEW" AND DEPRECIATION

Counsel for the company contends "that a subtraction for depreciation can be made only from cost of reproduction new" and

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that, upon the basis of the actual cost or investment appraisal by the Commission's engineer, without any deduction therefrom for accrued depreciation to disclose present value, the operating results for 1916 cannot be deemed to yield more than a reasonable return. That in a valuation of property upon the basis of original cost no deduction should be made for depreciation, is a contention which was expressly overruled by the Supreme Court of the United States in *Knoxville Water Co. v. City of Knoxville*, 212 U. S. 1, 13.

There are no unjust effects of this ruling upon the investors' right to a return upon their full investment, as was explained by the Maryland Commission in *Matter of Chesapeake & P. Teleph. Co.*, P. U. R. 1916 C, 925, 960: " * * * Hence, in case of a company which had maintained full depreciation reserves and invested the whole in additional plant, the problem would be merely to ascertain the value of the entire plant, and deduct from such value the amount of the reserves. The difference would be the value of the stockholders' investment upon which they would be entitled to a return, and the public would thus get automatically the return upon its share of the total investment, in that it would get the benefit of the use of the same, and would not have to pay the stockholders a return thereon. The correctness of this principle was recognized by Mr. Theodore N. Vail, president of the American Telephone & Telegraph Company, in his report for 1913 to the stockholders, where he said: 'The policy of investing the depreciation reserve in revenue-earning plant has continued, and the public is getting the advantage of the use of a large amount of plant upon which no dividend or interest charges have to be met.'"

Nor is there any injustice to investors even if the utility has in the past failed to accumulate an adequate depreciation reserve, not because of improvidence or excessive dividends but because of insufficient returns. In such a case, the company would have an equitable claim against the consuming public for repayment of the property used up in the public service (*Matter of Chesapeake & P. Teleph. Co.*, P. U. R. 1916 C, 925, 960; *Mat-*

ter of Seven-Cent Fares for N. Y. & No. Shore Traction Co., decided Jan. 10, 1918, 9 P. S. C. R. 1st Dist. N. Y. 1), and its claim would be recognized in going value. *People ex rel. Kings Co. Ltg. Co. v. Public Service Commission*, 210 N. Y. 479, 488.

As was more fully stated by this Commission in *Moritz v. Edison Elec. Illg. Co. of Bklyn.*, 7 P. S. C. R. 1st Dist. N. Y. 175, 200, that depreciation must be deducted in any valuation for rate-making purposes is not open to question, in view of controlling decisions of the courts. *People ex rel. Kings Co. Ltg. Co. v. Public Service Commission*, 156 App. Div. 603; *Knoxville v. Knoxville Water Co.*, 212 U. S. 1; *Minnesota Rate Cases*, 230 id. 352. This would be true in the instant proceeding, even were the Commission, or both parties, ascertaining "present value" solely from "original outlay" or "investment sacrifice," instead of as a fact from all the evidence.

LAND

As to lands, the issues here presented involve (1) the question whether they are to be valued according to the original cost, the assessed value, or an independent appraisal; and (2) the apportionment of the land between the electric and gas services.

The values testified to, for all land, were: Cost, \$83,249; assessed value, \$97,900; market value (company's witnesses), \$115,242. Deputy tax commissioners, long experienced in property values, testified that the assessed values of these lands represented fair market values. There was, however, a sharp conflict between this testimony and the testimony of the appraisers called in the company's behalf.

The Commission's engineers and the company's witnesses agreed in assigning 30 per cent of the office building and 100 per cent of a storage lot to the electric department; but, while the Commission's engineer assigned 68 per cent of the power house lot to that department, the Company's engineers assigned 81 per cent. The percentages of the gas-holder lot similarly assigned were 17 per cent and 32 per cent, respectively. Taking all the

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land together, the Commission's engineers assigned 42 per cent to the electric department, while the Company's engineer assigned 54 per cent.

Allowing for the fact that the company's apportionment of land reflects the use of the land subsequent to the date of the Commission's appraisal, the percentage assignment may be increased and the assigned portion valued for the purposes of this case at approximately \$50,000.

WORKING CAPITAL

Unlike a street railroad company which does business upon a cash basis and collects the revenues out of which to defray the wages of motormen, conductors and other employees in advance of payment of such expenses, an electrical utility does not collect the charges to consumers in advance, and, pending the payment of the bills rendered periodically, the utility must command resources for the payment of fuel bills, wages, etc., that enter into the cost of production of electricity.

The company claims an allowance for working capital amounting to \$141,500, made up of monthly averages as follows:

Outstanding consumers accounts.....	\$29,000
Outstanding city accounts.....	29,000
Cash	50,000
Material and supplies	54,000
	<hr/>
	\$162,000
Less accounts payable.....	20,500
	<hr/>
	\$141,500
	<hr/>

The electric operating expenses of the company during 1916, exclusive of depreciation charges, averaged about \$25,000 a month. About two months ordinarily elapse between the time when the company must pay for labor and material and the time it collects its bills from consumers. The company also needs to

carry a stock of materials and supplies. An allowance of \$110,000 for working capital appears to be fair, and represents average current assets (net), exclusive of the elements of profit and expense accruals.

RECAPITULATION

The following statement summarizes the allowances which the Commission finds should be made in figuring the fair value of the property for rate purposes as of January 1, 1917, under the record in this proceeding:

Property Summary

Cost new of tangible property (\$1,610,887 less \$35,161 land)	\$1,575,726
Accrued depreciation	400,272
Present value of tangible property.....	\$1,175,454
Land, present value.....	50,000
Organization, etc.	25,000
Working capital	110,000
Total fair value on January 1, 1917.....	\$1,360,454

Deducting the amount allowed for working capital, there remains a valuation presently of \$1,250,000, as compared with the company's book value of \$1,069,705 (\$1,733,819, fixed capital, less \$664,114 accrued depreciation; Louisiana R. R. Comm. v. Cumberland T. & T. Co., 212 U. S. 414, 424, 425) of permanent investment in electric property.

In comparing property with income received during the calendar year 1916, it is proper to adjust the property value to an average for the year. Such an average value would not be much in excess of \$1,300,000.

The sum of \$1,360,454 does not include \$75,960 expended for additions between January 1, 1917, and June 30, 1917, of which proof was given by the company's witnesses. This sum is the

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original cost of these additions not diminished by any accrued depreciation thereon, nor does this figure take into account depreciation of the whole property accruing after January 1, 1917.

REVENUE AND EXPENSES

The outstanding fact in the operating statistics of the Flatbush Gas Company is the rapidity of the growth of its commercial sales of electric current. In the last decade the number of consumers has increased from 530 to 11,941. The annual increases were as follows:

<i>Number of Consumers (Electric)</i>			
On December 31st		Increase	
1907	984		
1908	1,231	247	25 per cent
1909	1,894	663	54 per cent
1910	2,802	908	48 per cent
1911	3,955	1,153	41 per cent
1912	4,905	950	24 per cent
1913	6,181	1,276	26 per cent
1914	7,496	1,315	21 per cent
1915	9,632	2,136	28 per cent
1916	11,941	2,309	24 per cent

In no single year has the increase in the number of consumers been less than 21 per cent; since 1911 the annual increase has averaged 25 per cent and there have been no considerable variations from this average. The number of consumers has been doubling in a period of little more than three years.

More than one-half of the current sold by the company is for retail lighting at the maximum rate of 12 cents per kilowatt hour and the quantity sold has increased very nearly at the same rate as the increase in the number of customers. The average annual increase in sales since 1911 has been 23½ per cent; in 1916 it was 26 per cent.

The significance of these facts is patent upon a moment's reflection.

tion. Only a portion of the expenses of an electrical company increase in the same ratio as output. Twice as much business can be handled with a considerably smaller increase in wages and a still smaller increase in salaries. The increase in investment and consequently in fixed charges like interest, depreciation and taxes is also much smaller than the increase in output. There is a steady decline in the unit cost per kilowatt hour, an increase in the profit per kilowatt hour, and above all a large increase in the number of units sold, which would of itself bring in an increased return.

It is not, therefore, surprising that between 1912 and 1916 the Flatbush Gas Company's revenue from electric operations increased by \$242,000, or 80 per cent (from \$302,425 to \$544,180), while its expenses (including taxes but excluding depreciation) increased only 45 per cent (from \$209,578 to \$300,944). Profits in this period increased from \$93,000 to \$243,000, transforming a moderate return upon the investment into a large return.

The opinion included a summary of operating results for 1915 and 1916, containing the principal items of revenue and expense and also showing the unit costs per kilowatt hour. Owing to the increased cost of fuel and other items of production expense, the entire cost of a kilowatt hour, without considering depreciation or return on investment, remained almost stationary at five and twenty-two one-hundredths cents. But the increased consumption at the higher rates (*i. e.*, the commercial sales as contrasted with municipal sales) resulted in an increased profit of nearly three-fourths of a cent on the entire output. Gross profits before the deduction of depreciation increased from \$182,337 to \$243,236, or more than one-third.

The company's charge for depreciation under its filed rule is at the rate of three cents per kilowatt hour, less repairs, which in 1916 amounted to sixty-three one-hundredths of one cent. The resulting charge of two-thirty-sevenths of one cent per kilowatt hour is excessive, according to the opinion of the Commission's engineer. This opinion is corroborated by the Commission's gen-

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eral knowledge of the depreciation charges of other electrical utilities, one cent per kilowatt hour being considered high in New York city. Compared with the cost of the depreciable property the 1916 charge of \$137,191 is equivalent to a rate of 9 per cent, whereas the depreciation estimates of the Commission's engineers do not exceed 4 per cent. In a rate case, the Commission must determine the reasonable, necessary operating expenses to be met out of charges to consumers. The Commission cannot allow as an item of expense excessive depreciation charges, either for depreciation that accumulated during past years because, through neglect or mismanagement, it was not properly taken care of, for equalizing dividends, for the purpose of building capital additions and improvements which should largely be paid out of investment, or for a reserve for contingencies. Any reservation of profits for surplus or contingencies should properly come out of the profits, which should be sufficient to provide a fair return upon the investment with due consideration to requirements of contingencies and surplus.

If \$60,000 be deducted from gross profits for depreciation reserve, there will remain for 1916 a surplus not less than \$183,000, which is equal to 14 per cent upon a property valuation of \$1,300,000. Such percentage is manifestly in excess of the fair return which the company is entitled to exact in its rates. It is a higher rate of return than that earned by the Edison Electric Illuminating Company of Brooklyn, which pursuant to an order of the Commission reduced its maximum rate for current to eight cents and made other concessions in its rate schedule.

The effect of a similar reduction in the Flatbush Company's rates is readily ascertainable from the evidence. In 1916 the company sold 3,065,180 kilowatt hours at twelve cents and 104,794 kilowatt hours at ten cents. At an eight-cent rate the decrease in revenues from commercial lighting would have been \$122,607.20 plus \$2,095.88, or \$124,703.08. The retail power sales are relatively small in the aggregate and moreover are mainly at rates below the twelve-cent maximum, the average price received being only seven and one-half cents. An eight-cent maximum might,

with no increase in consumption, bring about a decrease of \$4,000 or \$5,000 a year. Certainly \$130,000 would be a liberal estimate of the decrease in the company's revenues under an eight-cent maximum rate.

But the eight-cent rate of the Brooklyn Edison Company was accompanied with another important change in its tariff schedule, — the discontinuance of the free lamp service. For reasons set forth at length in the opinions of the Commission in connection with the new schedules of the New York Edison Company, Brooklyn Edison Company, etc. (6 P. S. C. R. 1st Dist. N. Y. 289; 7 id. 175, 227), the companies have been permitted and required to discontinue the supply to consumers of the obsolete and inefficient carbon-filament lamps and instead to place on sale the vastly more efficient tungsten lamps. The same policy should prevail in the case of the Flatbush Company, which would thus be relieved of an expense that in 1916 amounted to \$12,861.

The company has indicated a desire to institute a minimum charge of one dollar a month for each meter installed. The Commission has in other cases recognized the fairness of this form of a service charge as meeting the necessary special expenses to which an electric company is put in carrying each consumer large or small, the reading of meters, the keeping of accounts, the sending and collecting of bills, and the interest, depreciation and repair charges on the special equipment provided for each consumer. *Moritz v. Edison Elec. Illg. Co. of Brooklyn*, 7 P. S. C. R. 1st Dist. N. Y. 175, 228; *Matter of Rates of New York & Queens Electric Lt. & Pr. Co.*, 8 id. 87, 91. If the individual consumer does not reimburse the company for such expenses through a special charge, he must pay equal compensation therefor in the form of a higher kilowatt hour charge, or else the expense must be borne by other consumers. Such a special charge is imposed, ordinarily, in the form either of a minimum consumption rate or of a fixed amount added to each bill. In the case of the consumer whose bill for actual consumption exceeds the minimum rate, the service charge is absorbed in the gross amount of his bill, and the minimum rate is compensation for the quantity of current which may

be purchased for that amount at the kilowatt hour rate; while a customer who does not consume the quantity of current to which he is entitled under the minimum rate likewise pays the minimum. Consequently, there is an apparent inequality in the benefits actually received by the two consumers who pay the same minimum charge. A fixed consumer charge, added to the bill of each consumer, obviates this objection to the minimum rate. The minimum rate is, however, a common and approved form of imposing the special consumer costs, and is also charged by the Edison Electric Illuminating Company of Brooklyn in the Brooklyn territory outside of the twenty-ninth ward. For the present, therefore, the Commission approves a minimum charge, reserving, however, for future consideration the question as to whether a fixed consumer charge should not be adopted by the Flatbush Gas Company as well as by other electrical companies, in place of the minimum rate. Of course, any question of a future change in the direction of imposing a fixed consumer charge would necessarily involve a readjustment of the energy charge to which it is to be added.

It is estimated that a minimum monthly charge of \$1 accompanied with an eight-cent maximum rate would have yielded the company approximately \$20,000 in 1916 and a charge of seventy-five cents approximately \$11,000. The latter amount is believed to be the more reasonable guarantee.

In the third place, the amount entered in the expense account for insurance is at least twice as large as it need be. Of the entire amount, \$30,000 is the company's estimate of the sum that should be set aside as a fund to insure its employees and others against accident in the electric department. But if the company did not elect to act as self-insurer under the Workmen's Compensation Act, it could procure insurance through the State Insurance Fund at a rate of \$6.25 per \$100 wages (exclusive of salaries of clerks, salesmen, collectors, etc.) and the entire premium would be less than \$9,000. Insurance against accident liability toward non-employees is not a large item, so that one-half of the \$30,000 actually charged by the company is considered ample for all accident insurance.

Offsetting a decrease of \$130,000 in revenue following a reduc-

tion in the maximum rate to eight cents per kilowatt hour are the possible gains enumerated which aggregate \$39,000, leaving the net decrease only \$91,000. Subtraction of this amount from the \$183,000 of profits for 1916 would leave a return of \$92,000 or somewhat more than 7 per cent on the property valuation of \$1,300,000 and a still larger percentage on the company's actual investment. The Commission does not doubt this to be a reasonable return.

SERVICE VALUE

An able and cogent argument, supported by evidence, has been submitted in behalf of the city of New York, to the effect that the rates charged by the Flatbush Gas Company in the twenty-ninth ward are in excess of the value of the service and, therefore, unreasonable. Testimony was offered by the city showing that the twenty-ninth ward is located almost in the center of the borough of Brooklyn, and had in 1915 a population of 97,414, which was more than double the population of a decade ago; that adjoining it on the south are the thirtieth, thirty-first and thirty-second wards, with respective populations in 1915 of 117,101, 49,996 and 38,540; that the density of population per acre of land area was, twenty-ninth ward, 25.5; thirtieth ward, 21.7; thirty-first ward, 7.8; and thirty-second ward, 7; that the thirtieth, thirty-first and thirty-second wards are at a greater distance from the Brooklyn Edison Company plant than the twenty-ninth ward is from the plant of the Flatbush Company, and yet the inhabitants of these three wards, as also the rest of the population of Brooklyn, now totaling over 2,000,000, who may be served with electricity, are paying the eight-cent rate, while those receiving electricity from the Flatbush Gas Company are paying at the twelve-cent rate. In other words, as the city contended, the vast majority of a single community of about 2,000,000 inhabitants can buy their current at eight cents, but a very small minority of a few thousand within the same single community, living under substantially similar circumstances and conditions, must still buy their current at twelve cents. It is pointed out that the Legislature itself, in fixing rates for electricity in the borough of Brooklyn, treated the borough as

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a unit and made no distinction between the residents of the different localities. Laws of 1905, chap. 732.

The Brooklyn Edison Company has transmission lines in the twenty-ninth ward from which current for light and power could be taken on Nostrand avenue, on Utica avenue and on Canarsie lane. It is asserted by the city that the Brooklyn Edison Company can and might well operate in the twenty-ninth ward under franchises held by the Kings County Electric Light and Power Company, whose property is leased to the Brooklyn Edison Company. The Edison Company has sufficient capacity to take on the load of the Flatbush Company and supply all its patrons.

The city further argues that a contention by the Flatbush Gas Company that it could not operate profitably at the eight-cent rate is unavailing, since it appears that, in the opinion of the Commission's engineer and expert, the company's producing plant is disadvantageously located for economic operation and thereby incurs higher operating costs than would be incurred if the plant were favorably located. That this injudicious location results in higher operating costs is quite apparent; but there is no proof of the extent of the added cost or the precise effect upon the rates. And there are perhaps other matters to be proved in order to furnish a complete basis for comparison between the Flatbush Company's rates and those of the Brooklyn Edison Company.

There is large merit and force, in fact and in law, in the point made by the city and the proof supporting it. Whether the proof is in all respects complete, or whether statements not proved but made in the brief of counsel for the Flatbush Gas Company would, if they had been sustained by evidence, disprove the city's allegations as to the value of the company's service, need not now be discussed further, in view of the conclusion which the Commission reaches as to the reasonableness of the present rate. The "value-of-the-service" argument gives added basis and support for the conclusion otherwise supported, and the Commission would act with moderation in sanctioning a scaling down rather than outright reduction.

RISING COSTS OF MATERIAL AND LABOR

If the prices of labor and material could be expected to remain normal or increase no more than they increased in 1916, an immediate reduction in the present maximum rate to eight cents would now be warranted, inasmuch as the normal growth in sales would very shortly compensate the company for such a reduction. Such was the experience of the New York Edison Company and other electrical companies for whose service there is a rapidly growing demand. But general price levels rose to such an unusual height in 1917 as to require particular consideration. Abnormal expenses in one year alone are not determinative of the earning requirements of a utility. *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 14, 15; *Darnell v. Edwards*, 244 id. 564, 570. In *Matter of New Passenger Tariffs of the Long Island R. R. Co.*, decided November 14, 1917, 14 St. Dept. Rept. 117, this Commission expressed the general rules by which it would be guided in the matter of rates in war-time conditions: "The foregoing, of course, does not in any way mean that in the consideration of the record in this case, the Commission has failed to take into account the disclosed facts, well within common knowledge, showing the extent to which war-time conditions have caused substantial increases in the cost of labor and of many commodities entering into the maintenance and operation of railroad common carriers and other public service corporations, just as into those of ordinary private enterprises. In calculating fair averages of costs and values over a period of years, the economic changes brought by the world war have been taken into account, and the Commission has not indulged in the violent assumption that after the war, prices and operating costs will of necessity return soon to before-the-war levels. The Commission passes upon rates for the present and the future, and in endeavoring to form a fair estimate of probabilities, even emergency conditions and their probable influence on price levels must be taken into account. The Commission is keenly conscious of the need for a broad, constructive, far-sighted policy in dealing with these applications of public utilities for rate advances designed to afford emergency relief from emergency conditions. It is in the

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public interest that these vital public utilities shall be kept in a condition of solvency and efficiency in service throughout the war, and that need must be taken into account in all rate problems. The public utility corporations will of course hardly expect to maintain their normal rate of return; they will not ask for aid in shifting to their patrons all the burdens of war costs, at a time when all individuals and businesses are having to assume a share of the Nation's burden; they will not seek to do violence to long-established rate schedules merely by reason of the increased costs and narrowed margin of return brought by emergency conditions both unusual and temporary. In fixing a rate for the future, the Commission is bound to take into account the facts which have been placed in the record, and the rights of the company and the public alike must stand or fall for the time on that basis."

This company has introduced evidence as to its experience since March, 1917, the latest month embraced in the Commission's exhibits, and contends that more reliance should be placed on the results for May and June, 1917, than those for any preceding period, as they represent conditions likely to prevail during the continuance of the war. But the Commission cannot fairly be expected to accept operating ratios shown by the months of May and June alone. For a metropolitan lighting company, these are among the poorest operating months of the year, and, aside from considerations of price level, would give the most unfavorable showing. But an electrical company must keep practically all of its men on the payroll and must maintain its plant regardless of the volume of business in any given month. Hence, with these expenses constant and the volume of business diminished during those months, the unit costs during such months will even in normal times be high. A trustworthy analysis of operating results must, therefore, distinguish between the relatively constant or fixed expenses and those that vary with output, number of consumers or other factors in the business.

Of the varying costs, the most important by far is the item of coal consumed for the production of electricity. A ton of coal cost the Flatbush Company approximately three dollars on the average

until the early part of 1917. Most of the coal used is anthracite of buckwheat size. In April and May, 1917, the company was paying for this four dollars and twenty-five cents a short ton and in June it paid even more for certain deliveries. It seems unlikely that these high rates will long be maintained, but, assuming that they continue during the next two years, we may calculate the probable results of operation in 1919 on the basis of an eight-cent maximum rate as previous described.

The total estimated receipts for 1919 are \$663,605 and the total expenses and taxes for 1919 are \$528,500.

The estimate of commercial lighting sales is based on the assumption of a growth in the volume of business below the present rate of business expansion. The increase in total sales for 1919 over those of 1916 is 48 per cent and this growth is of itself sufficient not only to make up the loss resulting from the substitution of the eight-cent rate for the twelve-cent rate but even to add \$120,000 to the gross revenue of that year. Expenses, on the other hand, even with \$86,000 added for coal at \$5.50 a ton, should not increase by more than \$167,000, so that operating income after depreciation should be not less than \$135,000. In making these computations the revenue has been figured on the basis of an eight-cent rate in place of the present twelve-cent rate and there has been eliminated from expenses the item of incandescent lamp installations and renewals. With the introduction of a minimum bill and a maximum demand rate schedule providing for secondary and tertiary rates for consumption of current in excess of the first two hours' daily use of maximum demand there would be some modification in the results. A certain amount of revenue would accrue on the minimum charge, which, however, would be less than the loss from the introduction of lower rates than eight cents for long-hour use of maximum demand. On the other hand, the company will be permitted during the first two months of 1919 to charge a maximum rate of nine cents per kilowatt hour. As the net result of these modifications there should remain available for interest and dividends in 1919 at least \$120,000, which would provide a return upon an investment of \$1,600,000 and leave a considerable

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margin for contingencies not already taken into consideration. The net additions to capital allowed for in an investment in 1919 of \$1,600,000 is ample upon the basis of net additions in previous years when the company's business increased in a greater percentage than is calculated for 1919.

This favorable result is due mainly to the fact already alluded to, that increased business can be taken care of without a proportionate increase in expenses. Depreciation and taxes, for example, depend in the main on the amount of property, which does not increase as rapidly as the output. Certain taxes like the income tax, the excess profits tax, and the special franchise tax, are exceptions to this rule, but the former are directly and the latter indirectly related to the *net* income and consequently cannot increase if net income diminishes with the reduction in rates. The salaries of superintendents are already large in proportion to the volume of business, having been greatly increased within the past year in consequence of a change in the method of apportionment between the electric and gas department. These salaries alone exceed \$1,000 a month, and until July 1, 1916, were divided equally between the two departments. Since July first, approximately 80 per cent of the expense has been charged to electric operations. This change was brought about by withdrawing a superintendent and three assistants entirely from gas operations. They are now in position to give all of their time to work in the electric department that formerly required only one-half their time, and there will have to be very considerable additions to the business of that department before they become so overburdened with work as to require more assistants.

For the time being, however, the company's expenses will be relatively heavy, — heavier than in 1916, which did not fully reflect the increases made in the second half of that year. In the first six months of 1917, the expenses exclusive of depreciation averaged five and eight-tenths cents per kilowatt hour, or five and one-half cents after deducting the \$10,000 of rate expense, as compared with five cents in the corresponding period of 1916.

While I do not feel that the Commission could accept the com-

pany's contention that the ratios of May and June, 1917, represent typical or permanent conditions, I realize that an *immediate* and complete reduction in the maximum rate from twelve cents to eight cents per kilowatt hour might prove to leave too small a margin for contingencies, and I think it preferable that, perhaps out of abundant caution, in view of war-time conditions, the reduction should be effected somewhat gradually.

PRESENT RATE SCHEDULE

I am not satisfied that justice would be done either to the company or its consumers, if the Commission failed to give consideration to the entire rate schedule, instead of stopping with the maximum rate. The conditions under which electric light or power is furnished are so different from those pertaining to the supply of gas that a single uniform rate applicable to every consumer would in itself constitute unfair discrimination and would so hamper the growth of the industry as to preclude rate reductions. Cost of service varies so greatly as to require a certain differentiation in rates, but the differentiation in the existing rates of the Flatbush Company is not based upon sound principles of rate-making and must be radically changed.

A glaring deficiency is disclosed in the company's methods of doing business, in that it has no well-balanced rationale of rate-making. Although the charge of undue discrimination between various patrons was insistently pressed by the complainant, at no time during any of the hearings in this proceeding did the company undertake to justify its classification of rates or the charges applicable to each classification. In response to repeated requests of the Commissioner presiding at the early hearings, the company's counsel stated that the company could produce no analytical study by its officials as to the factors which governed the variations in rates for different classes of consumers. Custom and expediency, tested by net results in profits, appear to be the theory of the company's present rate system.

It appears that for sign lighting and for battery charging, there are in force uniform flat rates considerably below the maximum

of twelve cents per kilowatt hour, namely, seven and one-half cents for sign lighting and five cents for battery charging. Otherwise, all users of current for light or power, whose consumption in any month is less than a certain minimum quantity, must pay the maximum rate. Discount allowances, however, are introduced when consumption becomes greater than this minimum. Lighting consumers whose monthly use equals 800 kilowatt hours are charged at the rate of ten cents for the entire amount. When monthly consumption reaches 1,200 kilowatt hours, a flat rate of eight cents per kilowatt hour applies; when it exceeds 2,000 kilowatt hours, the rate is reduced to seven cents. For power consumers, discounts are initiated much sooner. Twenty per cent is allowed on use of but 75 kilowatt hours. This is increased gradually to 83 $\frac{1}{3}$ per cent, making the lowest rate possible under this arrangement two cents per kilowatt hour. To get the benefit of this low rate, monthly consumption must be close to 60,000 kilowatt hours.

The conspicuous feature of the company's business is that it is overwhelmingly retail and largely residential. About 98 per cent of bills rendered during 1916 was for retail lighting at the maximum rate of twelve cents per kilowatt hour. This 98 per cent consumed but 53 per cent of the current sold but was the source of about 68 per cent of the total revenue. Large consumers constitute less than $\frac{1}{2}$ per cent of all consumers, consume about 7 per cent of the current sold and contribute about 6 per cent of the total revenue. On the average they enjoy a differential of about four cents a kilowatt hour.

The average rate for power is slightly over four cents. It will be found that this low average is due chiefly to the inclusion of two consumers who get especially low rates. They are Newman & Carey, subway constructors, and the Brooklyn Hygeia Ice Company. The latter is the only consumer getting the company's minimum rate of two cents per kilowatt hour.

It may be that the special conditions under which the Brooklyn Hygeia Ice Company operates deserve a particularly low rate. The company did not submit sufficient evidence for determining

exactly what preference should be shown it. Simply as a matter of discrimination, it is doubtful whether the two-cent rate was ever defensible; but, in view of the present operating ratios, no doubt can be entertained that it is unduly and even grossly preferential. A rate should at least pay for the direct cost of production and should also contribute towards special and general expenses. The cost of production for six months ending June 30, 1917, was one and fifteen one-hundredths cents per kilowatt hour for fuel alone; with all other elements of production items it reached two and one hundred thirty-seven one-thousandths cents. In the face of the company's claim that these figures are too low to be used in the determination of costs for retail rates, it will be difficult for it to contend that a two-cent rate to any consumer is remunerative. The company may have the right to make special rates because of special circumstances. But it is obviously unfair to demand of consumers that they make a contribution towards the cost of the current used by others. Unless this rate be increased, that situation will follow.

A particularly objectionable feature of the step rate is the excessive charge it imposes on the largest consumers in each rate class. A monthly consumption of 700 kilowatt hours, for example, falls in the first step, or twelve-cent rate, the bill for which will be \$84. But another consumer using 100 kilowatt hours more, or 800 kilowatt hours, will pay at the second step rate of ten cents, or \$80. Under these conditions the first consumer would save four dollars by permitting his lamps to burn in daylight a sufficient length of time to add 100 kilowatt hours to his meter reading. Any rate schedule that produces such discrimination and directly encourages waste should be revised.

PRINCIPLES TO BE OBSERVED IN A RATE SYSTEM

New rates prescribed should at least attempt to follow some consistent theory of scientific rate-making. There is a fundamental objection to any schedule based on sheer use of current without relating that use to the size of the consumer's installation and extent and time of his use thereof. The reasons for this differenti-

ation between consumers on the basis of time and conditions of service are fully discussed in the opinion of the Commission in the case of Edison Electric Illuminating Company of Brooklyn, 7 P. S. C. R. 1st Dist. N. Y. 175, 221, 222.

NEW RATE SCHEDULE PROPOSED BY THE COMPANY

The present rate schedule is based on consideration of quantity alone. The rates are not graded according to any theory of extent or time of use of the consumers' installation. And excepting as to battery charging, it makes no especial concessions for use of current during off-peak periods. Nor does the schedule show evidence of a plan to assign to the various classes of consumers any special expenses occasioned by them. In the retail lighting class the rate imposed upon the consumer who uses but one kilowatt hour a month is the same as that imposed upon one who uses several hundred kilowatt hours per month. Not even a minimum guarantee is required of the former. Nor is any distinction drawn between the consumer who has a large installation but who uses it for a very brief period per day, and the consumer whose installation may be smaller but who uses it more constantly.

A new rate schedule has been submitted informally by the company, which substitutes a block rate for the existing step rate, thus: First 200 kilowatt hours, ten cents; next 300 kilowatt hours, nine cents; next 400 kilowatt hours, eight cents; over 900 kilowatt hours, seven cents. Minimum charge one dollar per month per meter.

This has not been placed in evidence at the formal sessions in this proceeding, and it is therefore considered only argumentatively and not as having any probative force.

The Brooklyn Edison Company exacts a minimum charge of twelve dollars a year, thus permitting a customer who pays more than one dollar in a winter month to apply the excess towards his deficiency in a summer month. This seems the fairer practice and, if it is not followed by the Flatbush Company, the minimum monthly charge should not exceed seventy-five cents. The more usual minimum charge is fifty cents, which prevails in Chicago

and many other cities. A seventy-five-cent monthly charge would amount to nine dollars a year, which is probably more than the separable expenses chargeable against each meter. If this minimum charge or guarantee were not exacted, the company would necessarily be permitted to charge per kilowatt hour a little more than the maximum rate now contemplated.

The block rates remove one of the objections to the present step rate already set forth but they retain the fundamental defects of a rate schedule based solely on quantity and would therefore continue unfair discriminations. The company originally had no data or calculation that served as a basis for the existing rate schedule and none for the proposed new schedule. On the request of the Commission, however, it has submitted elaborate statistics concerning the various installations of its customers that will aid in the determination of a rate schedule conforming in part at least with the principles underlying an equitable schedule of rates.

CUSTOMERS' INSTALLATIONS AND MAXIMUM DEMAND

The company had no record of the maximum demand made by the various customers upon its plant capacity or investment and no record of the number of their lamps or other appliances, but it furnished comprehensive data respecting the number of sockets or outlets in the various installations. The standard socket is rated at fifty watts, which is the capacity of the lamp in general use and upon examination it was found that this rating is sufficiently accurate in the case of this company's connected load to permit the use of the outlet data on the basis of that equation.

While the company's present rate schedule combines residential and commercial lighting in the same rate, the data furnished have permitted the complete separation of the two services, which is desirable in view of the marked differences between them, particularly in the relationship between connected load and the demand at any particular moment of time. A householder with an installation of one kilowatt (twenty fifty-watt lamps) seldom has occasion to use all the lamps at the same time and therefore imposes a burden upon the plant capacity very much less than one

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kilowatt. The ratio of maximum demand to connected load has been found in general experience to vary from 20 to 25 per cent to about 50 per cent in residences, while it runs to 60, 70 and 80 per cent in stores, offices and other business places.

So far as the size of installation is concerned, it appears that almost one-half of the commercial customers fall in the smallest class of not more than ten outlets or lamps, equivalent to 500 watts or one-half kilowatt, while only 14 per cent of the residential customers fall in this class. The typical installation of the residential customers consists of 11-20 sockets or lamps.

If the two groups of customers made use of their installations for an equal length of time, the residential consumers would have the larger consumption. Such, however, is not the case, their average consumption being only twenty and one-half kilowatt hours as compared with an average of eighty-three kilowatt hours for the commercial customers. While the residential customers constitute 86 per cent of the retail lighting customers, they use only 60 per cent of the current consumed. No residential consumer used over four hundred kilowatt hours and there are relatively few who used more than fifty kilowatt hours. More than three-fourths used less than twenty-five kilowatt hours a month. In this class they constitute over 90 per cent of all consumers.

In other words, the residential consumer, as a rule, appears to be a relatively short-hour user of electric current as compared with the majority of customers using electric light for business purposes.

Offices, restaurants, drug stores and laundries appear to have particularly good load factors, entitling them to favorable rates whether their consumption is large or small. The conclusions as to average daily use of demand are necessarily approximate since there has been no actual measurement of maximum demand. But even if residences made a demand equal to only 25 per cent of connected load instead of the 50 per cent herein assumed, their use of demand would still be less than that of commercial customers (here estimated to be 70 per cent of the connected load).

Detailed examination of bills shows conclusively that the long-hour users are predominantly customers with relatively small

installations and not the large customers, who under the company's proposed schedule as well as the existing schedule, receive the most favorable rates. The distribution of kilowatt hours consumed does not therefore follow precisely the same grouping as that of the number of consumers. About 86 per cent of the residential consumption falls in the "two hours daily use" group and about 50 per cent of the commercial consumption.

Upon consideration of the evidence, the Commission is of the opinion that proper rate-making principles require the adoption of a primary rate of ten cents per kilowatt hour and a secondary rate of six cents at the present time, and a gradual reduction in the primary rate, in keeping with the growth of consumption until an eight-cent maximum is reached. Separate rate schedules should be framed for residential lighting and commercial lighting, and also for power. The existing power schedule known as "Rider 4" is indefensible in its complete disregard of the cost of service principle. Discounts for mere quantity of consumption lead to unjust discrimination and ought to be abolished. Large users who have a favorable load factor entitling them to a lower rate can be retained by a proper scale of demand charges; those who do not offer a favorable load factor should pay the same rate as small users, due consideration being given to the element of consumer expense. The matter was more fully discussed in the Commission's opinion in the Brooklyn Edison case, and in view of the relatively small amount of power sold by the Flatbush Company, it need not receive further attention here.

Although the Commission now fixes the primary and secondary rate *maxima*, it recognizes, of course, that tertiary, and perhaps still lower, "step" rates must be made available by the company, in order to encourage quantity consumption under economical operating costs. The Commission therefore leaves it to the company to prepare and submit for approval a schedule which will include the additional "steps," in conformance with the rate-making principles set forth in this opinion and in that in the Brooklyn Edison case.

CONCLUSION

But for the factors of uncertainty which are operative in the public utility field at the present time, I would advise the immediate reduction of the general rate of the Flatbush Gas Company to eight cents per kilowatt hour. Under all of the circumstances stated in the opinion, however, my conclusion is that the company should put into effect the following rates:

From March 1, 1918, to and including August 31, 1918, ten cents per kilowatt hour for the first two hours' average daily use of the maximum demand.

From September 1, 1918, to and including February 28, 1919, nine cents per kilowatt hour.

From and after March 1, 1919, eight cents per kilowatt hour.

From and after March 1, 1918, not more than six cents per kilowatt hour for current consumed in excess of the amount used under the above-indicated rates.

The maximum demand should be computed as 50 per cent of the total installation in residences and 70 per cent for all other premises. Any customer who desires to have accurate information as to his actual maximum demand, shall upon payment of a monthly charge of one dollar, be entitled to a maximum demand indicator to register the demand in lieu of the percentage rating.

The company may institute a minimum charge of twelve dollars a year, to be collected in monthly installments.

The company shall discontinue the supply of carbon lamps and supply Mazda lamps or other lamps of equal or superior efficiency, charging therefor a price not in excess of the actual cost to it of such lamps.

The company shall prepare and submit for the Commission's approval a rate schedule covering all classes of its service, in conformance with this opinion.

The company shall keep, and file promptly with the Commission, such records as will show, month by month, from March 1, 1918, to February 28, 1919, its revenues and expenses.

In the event that on or before August 31, 1918, or on or before February 28, 1919, the company's actual experience with the low

ered rate at that time in force is deemed by the company to fairly show the unremunerativeness, unreasonableness or confiscatory consequences of such rate, the company may at any such time, upon such a showing of actual financial results, apply to the Commission under section 22 of the Public Service Commissions Law for such a modification of the present order as will grant the requisite relief from the requirement of further reduction or authorize the restoration of the rate now in force. If this order is now accepted and put in force, the Commission, upon any such application, will give careful consideration to all facts presented, inquire carefully to ascertain whether its anticipations as to the effects of the lowering of the rate have been proved in any respect erroneous, and in the light of such actual experience will modify its order in any way proved necessary to secure to the company the reasonable return contemplated by law.

Upon the foregoing opinion the Commission, on the 1st day of February, 1918, made the following order:

BY THE COMMISSION.—A hearing having been had upon the complaint dated June 10, 1912, of Samuel Evans Maires and more than 100 other customers of the Flatbush Gas Company, before Hon. Milo R. Maltbie, Commissioner, beginning July 30, 1912, and continuing before Hon. William Hayward, Hon. Charles S. Hervey, and Hon. Travis H. Whitney, Commissioners, on and after October 23, 1916; Albert Moritz appearing for the complainants; William N. Dykman, John J. Kuhn, and Jackson A. Dykman, appearing for the Flatbush Gas Company; William L. Ransom, counsel, Henry H. Whitman, Jacob H. Goetz, and George H. Stover, assistant counsel, attending for the Commission, and the Commission having made an investigation as to the cause for such complaint and to enable it to ascertain the facts requisite to the exercise of the powers conferred upon it, and being of opinion that the rates or charges made or demanded by the Flatbush Gas Company are unjust and unreasonable, and unjustly discriminatory and unduly preferential; it is ordered

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I. That the maximum price to be charged by the Flatbush Gas Company for electric service, exclusive of the installation and renewal of electric lamps, shall be as follows:

(a) On and after March 1, 1918, to and including August 31, 1918, ten cents per kilowatt hour.

(b) On and after September 1, 1918, to and including February 28, 1919, nine cents per kilowatt hour.

(c) On and after March 1, 1919, to and including February 29, 1920, eight cents per kilowatt hour.

II. That on and after March 1, 1918, to and including February 29, 1920, the Flatbush Gas Company shall not charge more than six cents per kilowatt hour for the excess over the first two hours' average daily use of the maximum demand of any customer.

III. That the tertiary and succeeding step rates for electric consumption in excess of four hours' average daily use of the maximum demand, and such definitions and rules for the determination of the demand as shall be reasonable and necessary, shall be included in the rate schedule hereinafter required to be submitted on or before February 20, 1918, to the Commission for its approval; such rates and rules to be in conformity with this order and the opinion of the Commission filed simultaneously with the order.

IV. That after July 1, 1918, the Flatbush Gas Company shall not furnish to its customers gem lamps or other lamps of an efficiency of less than one and one-quarter watts per candle power, and the charge for such lamps shall not be in excess of the actual cost thereof to the company, including the cost of handling and sale. The maximum price to be charged for the installation and renewal of incandescent lamps furnished by such company in connection with the supply of current for lighting under any lamp service agreement shall be one-half of one cent per kilowatt hour. If tungsten lamps of smaller capacity than fifty watts are furnished by said company under such lamp service agreement, the company shall be entitled to make an extra charge therefor but not more than the additional cost of the installation and renewal of such smaller lamps.

V. Further ordered that on or before March 1, 1918, said company shall issue, file and post a schedule or supplement to carry into effect the provisions of this order.

VI. Further ordered that the Flatbush Gas Company shall prepare, and on or before February 20, 1918, shall submit to the Commission for its approval, a rate schedule covering all classes of its service in conformance with this order and the opinion of the Commission rendered simultaneously with the making of this order.

VII. Further ordered that this order shall take effect forthwith and shall continue in force until changed or abrogated.

VIII. Further ordered that on or before February 11, 1918, the Flatbush Gas Company shall notify this Commission in writing whether the terms of this order are accepted and will be obeyed.

IX. Further ordered, in accordance with the opinion in this case rendered on February 1, 1918, that in the event that on or before August 31, 1918, or on or before February 28, 1919, the company's actual experience with the lowered rate at that time in force is deemed by the company to fairly show the unremunerativeness, unreasonableness or confiscatory consequences of such rate, the company may at any such time, upon such a showing of actual financial results, apply to the Commission under section 22 of the Public Service Commissions Law for such a modification of the present order as will grant the requisite relief from the requirement of further reduction or authorize the restoration of the rate now in force. If this order is now accepted and put in force, the Commission, upon any such application, will give careful consideration to all facts presented, inquire carefully to ascertain whether its anticipations as to the effects of the lowering of the rate have been proved in any respect erroneous, and in the light of such actual experience will modify its order in any way proved necessary to secure to the company the reasonable return contemplated by law.

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In the Matter of the Hearing on the Motion of the Commission on the Question of the Extension of the Gas Mains of the NEW YORK AND QUEENS GAS COMPANY to such Extent as may be Necessary to Serve Residents of Douglaston, Douglas Manor and Little Neck, in the Borough of Queens, City of New York

Case No. 1856

(Public Service Commission, First District, February 1, 1918)

A public service corporation which has delayed for years to comply with its franchise requirements and an order of the Commission cannot be permitted to still further delay such compliance.

The New York and Queens Gas Company, upon the unanimous affirmation of this Commission's order by the New York Court of Appeals and the Supreme Court of the United States, now comes before this Commission again for a rehearing as to the order so affirmed. The order in question called for the early extension of gas mains and service within the petitioner's franchise area in conformity to its franchise obligations. Such extension of mains is greatly needed by the communities affected. *Held*, that the Commission should not countenance the company's unconscionable effort to obtain further delay without recognition of its legal obligations and that for the most part the allegations of the present petition are vague and insufficient, much more indefinite and inadequate, in fact, than those of the petition already passed on adversely by the Commission. Application for rehearing denied and an order made fixing new dates for the beginning and completion of performance, the dates fixed by the order of March 19, 1915, having expired while the matter was in the courts. The fixation of new dates is without prejudice to a further application by the company if it deems the facts warrant an extension beyond the dates now fixed.

HERVEY, Commissioner.— Following the unanimous affirmation of this Commission's order by the New York Court of Appeals and the Supreme Court of the United States, the New York and Queens Gas Company comes for a second time to this Commission to ask for a re-hearing as to the order so affirmed. The Commission's denial of the first application for re-hearing was a part of the record passed upon by the courts, and the refusal of that application has been sustained by the highest court of the State and the Nation.

I am of the opinion that this second effort to obtain a reconsideration of the propriety of requiring this company to live up to its franchise obligations should be denied, and steps taken to bring about early compliance with the Commission's order or to punish non-compliance. The early extension of gas mains and service, within the petitioner's franchise area, as called for by the Commission's order of March 19, 1915, is greatly needed by the residents of the communities affected, and the Commission should not countenance the company's unconscionable effort to obtain further delay without recognition of its legal obligations. When this matter was acted upon by the Commission in the fall of 1915, the opinion adopted by the Commission said, in part:

"If the people in this section of the borough of Queens are to be benefited by the transfer of control to the Consolidated Company, it would seem that this is an opportune moment. It is surprising that so soon after the decision permitting the Consolidated Company to acquire control of the New York and Queens Gas Company, that company should refuse to make extensions to Douglaston unless it is assisted financially by the consumers themselves, for the company states that it is willing to build the new main, provided the consumers or some one will advance the money and will accept repayment month by month to the extent of 25 per cent of the gas bills.

"When the company accepted franchises for the whole of the third ward, it assumed certain obligations. The company may not have obligated itself to lay drains throughout the entire area regardless of the density of population, but it certainly can not go to the other extreme, select the most profitable parts and leave the less profitable areas to look out for themselves. At present, however, it assumes very much such an attitude towards the Douglaston area. The company is supplying gas to other areas which are populous and easily supplied. Even Bayside, a suburban development immediately to the west of Douglaston, receives gas. It will always be expensive to lay mains to serve the Douglaston area, for Alley Creek and the bay intervene, and the gas works have been located by the company far from this section.

The existing distribution system is not adequate to supply Douglaston in addition to the other areas now being supplied, and long mains must be built not merely from the ends of the mains to the west of Douglaston, but far back to the gas works.

"Apparently, these conditions will continue. The topographical situation can not be changed, and the distribution system is not likely soon to be rebuilt. If the company's position is sound, the residents of the Douglaston area can not obtain gas until their district becomes so populous that the new business will earn 6 per cent on the cost not only of the mains in their own territory but of the mains clear back to the works. If the works are located far enough away, this day will be very far distant; and yet the company in the meantime holds franchises in reserve, building upon them as it wishes. Is it fair for a company to select the most profitable areas and then contend before this Commission that it should not be required to build elsewhere unless the new business will earn 6 per cent on the cost of construction? This principle has been rejected by the Commission in the case of street railways, and the Commission's decision has been approved by the courts."

The Commission's action in the matter was unanimously upheld by a clearly reasoned opinion in the New York Court of Appeals, in the course of which it was said:

"The public service commissions are authorized by law to order reasonable improvements and extensions of the works, wires, poles, lines, conduits, ducts and other reasonable devices, apparatus and property of gas corporations, electrical corporations and municipalities. (Pub. Serv. Com. Law [Cons. Laws, ch. 48], sec. 66.)

"Under the authority of this statute the public service commission for the first district made the order requiring the relator to extend its gas mains and services to meet the reasonable requirements of Douglaston and Douglas Manor. * * *

"The public service commissions were created by the legislature to perform very important functions in the community, namely, to regulate the great public service corporations of the state in

the conduct of their business and compel those corporations adequately to discharge their duties to the public and not to exact therefor excessive charges. It was assumed perhaps by the legislature that the members of the public service commissions would acquire special knowledge of the matters intrusted to them by experience and study, and that when the plan of their creation was fully developed they would prove efficient instrumentalities for dealing with the complex problems presented by the activities of these great corporations. * * *

"The question now is whether or not there was any evidence to show that the order of the public service commission was an unlawful and arbitrary exercise of power.

"There was no dispute as to the basic facts of the case. There was some variation in the estimates of the witnesses as to the cost of iron pipe and the expense of engineering supervision and like matters, but there was no real disagreement as to the cost of the extension of the relator's system of gas distribution, and the increase in revenue that the relator would probably receive therefrom.

"The court at the Appellate Division in its opinion summed up the proof on the subject. The court said that the cost of the extension would be between \$60,000 and \$70,000, and that the increased return to the relator from the consumption of gas would be about \$1,660 per year, which is only one-half of the interest at five per cent upon the extension.

"This is very far from showing that the order of the public service commission was simply an arbitrary and capricious exercise of power * * *."

The Supreme Court of the United States likewise sustained with a unanimous voice the action of the State tribunal. The notable opinion read by Mr. Justice Clarke expressed views which apply with great force to many of the allegations of the company's second petition for a re-hearing:

"* * * The case is now in this court for review of the judgment entered upon the decision of the Court of Appeals and it is presented upon a single assignment of error, viz: 'That the

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order of the Public Service Commission * * * was illegal and void in that it deprived the gas company of its property without due process of law and denied to it the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States, in requiring the company to extend its distributing system under great physical difficulties and at enormous expense to an independent and remote community which the company was under no present duty to supply with gas when it appeared that the gas company would not obtain an adequate return from the expenditure required to make such extension.'

"More compactly stated, this assignment of error is, that the order deprived the gas company of its property without due process of law, because obedience to it would require an expenditure of money upon which the prospective earnings would not provide an adequate return.

"The Court of Appeals of New York decided that the Public Service Commission was created to perform the important function of supervising and regulating the business of public service corporations; that the State law assumes that the experience of the members of the Commission especially fits them for dealing with the problems presented by the duties and activities of such corporations; that the courts in reviewing the action of the Commission have no authority to substitute their judgment as to what is reasonable in a given case for that of the Commission, but are limited to determining whether the action complained of was capricious or arbitrary and for this reason unlawful; and that it was clearly within the power of the Commission to make the order which is here assailed.

"This interpretation of the statutes of New York is conclusive, and the definition, thus announced, of the power of the courts of that State to review the decision of the Public Service Commission, based as it is in part on the decision in *Interstate Commerce Commission v. Illinois Central R. R. Co.*, 215 U. S. 452, 470, differs but slightly, if at all, from the definition of this court of its own power to review the decisions of similar administrative bodies, arrived at in many cases in which such decisions have been under

examination. Typical cases are: *Baltimore & Ohio R. R. Co. v. Pitcairn Coal Co.*, 215 U. S. 481-494; *Kansas City Southern Co. v. United States*, 231 U. S. 423, 443-4; *Louisiana R. R. Comm. v. Cumberland Tel. Co.*, 212 U. S. 414, 420-2; *Interstate Commerce Commission v. Union Pac. Railroad Co.*, 222 U. S. 541-547, and *Cedar Rapids Gas Co. v. Cedar Rapids*, 223 U. S. 655, 668.

"It is the result of these and similar decisions, that while in such cases as we have here this court is confined to the federal question involved and therefore has not the authority to substitute its judgment for that of an administrative commission as to the wisdom or policy of an order complained of, and will not analyze or balance the evidence which was before the Commission for the purpose of determining whether it preponderates for or against the conclusion arrived at, yet it will, nevertheless, enter upon such an examination of the record as may be necessary to determine whether the federal constitutional right claimed has been denied, as, in this case, whether there was such a want of hearing or such arbitrary or capricious action on the part of the Commission as to violate the due process clause of the Constitution.

"The result of the application of this rule to the record before us cannot be doubtful. The gas company appeared at the hearing before the Commission, cross examined witnesses, introduced testimony and argued the case. On writ of certiorari the case was reexamined by the Appellate Division of the Supreme Court, and it was again reviewed on appeal, by the Court of Appeals. In the matter of procedure plainly the company cannot complain of want of due process of law.

"The record shows that the company at the time of the hearing had franchises authorizing it to manufacture and sell gas throughout the third ward of the borough of Queens, in the city of New York, and that, it being the only company which had franchises for any part of that area, the community to which it was ordered to extend its distributing system must continue without gas if the order does not become effective.

"The community of Douglaston, including Douglas Manor, was

a rapidly growing settlement of three hundred and thirty houses, of an average cost of \$7,500, thus giving assurance that the occupiers of them would be probably users of gas, and which, with very few exceptions, were occupied by families the entire year. While the community is described in the assignment of error as 'independent and remote' the record shows that it was served at the time by franchise holding companies, which supplied water, electric light and telephone to its inhabitants, and that the number of houses had doubled within a few years.

"The length of the extension ordered was about one and one-half miles but the mains of the company, which extended to the point nearest to Douglaston, were being used to almost their full capacity, and for this reason the estimated cost of making the improvement included new mains of some eight miles in length. The engineer of the gas company testified that the cost of the ordered extension would be approximately \$86,000, while the engineer for the Commission estimated the cost at \$61,000. The Commission found that only \$45,000 of the new investment required would be properly chargeable against the extension ordered, since the newer and larger mains would be available in part for other business.

"On the basis of the company's estimate of the cost of the extension the income would be about $2\frac{1}{4}$ per cent per annum, and, on the basis of the estimate by the Commission of the part of the cost properly chargeable to the Douglaston community the income would be 4 per cent. There is no showing in the record as to the fair value of the entire property of the gas company used in the public service, nor of the rate of return which it was earning thereon, and therefore even if the return on the cost of complying with the order be conceded to be inadequate, this would not suffice to render the order legally unreasonable. *Atlantic Coast Line R. R. Co. v. North Carolina Corporation Commission*, 206 U. S. 1, 24-6; *Mis. Pac. Ry. Co. v. Kansas*, 216 U. S. 262; *Puget Sound Traction Co. v. Reynolds*, 244 U. S. 574, 580.

"It is significant also that within a year preceding the hearing by the Commission the gas company proposed in writing to the

residents of Douglaston that it would extend its mains to the settlement if they would advance \$10,000, to be returned in semi-annual credits upon the amount of gas consumed.

"These references to the evidence will suffice. They show this Public Service Commission ordering a public service corporation to render an important public service, under conditions such that in the aspect least favorable to the gas company the initial return upon the investment involved would be low but with every prospect of its soon becoming ample, and also that no claim was made by the company that the comparatively small loss, which the company claims would result, would render its business as a whole unprofitable.

"Corporations which devote their property to a public use may not pick and choose, serving only the portions of the territory covered by their franchises which it is presently profitable for them to serve and restricting the development of the remaining portions by leaving their inhabitants in discomfort without the service which they alone can render. To correct this disposition to serve where it is profitable and to neglect where it is not, is one of the important purposes for which these administrative commissions, with large powers, were called into existence, with an organization and with duties which peculiarly fit them for dealing with problems such as this case presents, and we agree with the Court of Appeals of New York in concluding that the action of the Commission complained of was not arbitrary or capricious, but was based on very substantial evidence. * * *"

Most of the matters alleged in the present application for a re-hearing were considered, in identical or somewhat similar form, upon the original hearing or in connection with the company's first application for a re-hearing. For the most part, the allegations of the present petition are vague and insufficient — much more indefinite and inadequate, in fact, than those of the petition already passed on adversely by the Commission. With the sole exception of conditions claimed to have arisen by reason of the European war, during the time the company was unsuccessfully litigating instead of building the needed extensions, the present

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petition avers nothing in the nature of definitely stated facts which the Commission has not fully considered at the time the original order was made and the first application for re-hearing denied. In fact, as to any matters not in the nature of facts arising since the making of the order, the Commission would not be disposed to grant a re-hearing at this time, in view of the great need for these extensions, the company's persistent and successful policy of delay, and the obvious impropriety of this Company's effort "to pick and choose" — to use the Supreme Court's felicitous phrase — "serving only the portions of the territory covered by their franchise which it is presently profitable for them to serve and restricting the development of the remaining portions by leaving their inhabitants in discomfort without the service which they alone can render." Except as to matters which have arisen after the time when the company might in good conscience have complied with its lawful obligations, the companies had full opportunity to present before the Commission any available proof in support of the allegations which they now so perfunctorily re-state. As the Supreme Court pointedly said, "to correct this disposition to serve where it is profitable and to neglect where it is not, is one of the important purposes for which these administrative commissions, with large powers, were called into existence, with an organization and with duties which peculiarly fit them for dealing with problems such as this case presents," and I am of the opinion that the Commission should give no aid to an effort based so palpably on a desire for further delay.

The lapse of more than three years and a half from the inception of this proceeding finds no step taken by the company to fulfill what the highest courts have held to be its franchise obligations. None of that delay has been attributable to the Commission; the matter has been energetically and successfully prosecuted by the Commission's representatives through the various courts. But if we assume that the adequate protection of the company's right of resort to the courts made necessary the lapse of all the time consumed by the company's effort to litigate where the highest courts of the State and Nation unanimously held there was nothing

to litigate, the fact remains that the matter has now come again into the control of the Commission, after the expiration of nearly three years, and the Commission ought now to see to it that the "important purpose" for which it was created is fulfilled as to these Douglaston consumers. As a sheer matter of bringing about an end to litigation, as the Supreme Court ruled in *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, there would be ample warrant for bringing now to a close the company's effort to turn judicial processes into a hippodrome. How serious is this aspect of the matter is revealed by the following "time-schedule" of this case:

Spring months, 1914. Complaints by 300 or more residents of Douglaston, Douglas Manor, Little Neck, etc., that the company was doing nothing to fulfill its undoubted franchise obligations to supply them with gas.

June 24, 1914. Company offered in writing to build the extension if residents would advance \$10,000, to be returned on the gas consumed, 25 per cent of the gas bills to be returned semi-annually—a proposition of which the acceptance would have brought the completion of the extension and the repayment of the deposit before the time in 1918 when the Commission can possibly secure gas service to these consumers, despite the Commission's success in the courts, and even if the present application for a re-hearing is denied.

July 23, 1914. The Commission directs a public hearing.

July 29, 1914. First hearing is held and Commission indicates its purpose to obtain an early outcome.

October 6, 1914. Hearings before the Commission closed.

February 11, 1915. Opinion of Commissioner Maltbie for the granting of the application approved by the Commission.

March 19, 1915. Order adopted, directing the company to begin the extension not later than April 30, 1915, and complete it not later than September 1, 1915.

April 10, 1915. Company presents a petition for a re-hearing, on grounds covering nearly all of those indicated in the present petition for a re-hearing.

April 27, 1915. Application for a re-hearing denied by the Commission.

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April 30, 1915. Company obtains a writ of certiorari from Justice Peter A. Hendrick in the New York County Supreme Court.

October 19, 1915. Return to the writ of certiorari filed.

February 16, 1916. Certiorari writ argued in the Appellate Division for the First Department.

March 3, 1916. Decision of the Appellate Division, sustaining the writ and annulling the Commission's order of March 19, 1915.

March 16, 1916. Appeal by the Commission to the Court of Appeals.

May 23, 1916. Appeal argued in the Court of Appeals.

October 3, 1916. Decision of the Court of Appeals, reversing the determination of the Appellate Division and reinstating and affirming the order of the Commission.

January 30, 1917. Company obtains writ of error, to carry the case to the Supreme Court of the United States.

April 21, 1917. Commission moves to dismiss writ of error for lack of jurisdiction.

June 4, 1917. Supreme Court retains motion and orders motion and case for hearing on summary docket.

November 6, 1917. Case argued in Supreme Court of the United States.

December 10, 1917. Unanimous decision of the Supreme Court, affirming the action of the New York Court of Appeals and affirming in all respects the order of the Commission.

January 1, 1918. No gas yet supplied or gas mains yet laid, to furnish service to consumers whom the highest courts of the State and Nation have unanimously held were entitled to receive it, as a matter of the company's contract obligations, in 1914, before, and ever since.

January 4, 1918. Company again applies for a re-hearing by the Commission, to start the tread-mill of delay and litigation all over again, even after the courts have held the Commission was right in denying the first application for a re-hearing.

In point of fact, however, the denial of this reapplication for a rehearing may be placed squarely on the inadequacy of the petition

to warrant reconsideration of matters already over-litigated. As to the more or less nebulous claims as to conditions which the company says have arisen during the period it has failed to utilize its opportunity of compliance with the Commission's order, a petition more comprehensively prepared than that now before the Commission might be conceived to present some very serious questions of law and policy as to the powers and duties of this body. May a company delay for years to do a thing required of it by its franchises and a specific order of the Commission, and gamble on the hazard that during such period of delay the cost of such compliance will become less, or that conditions will arise which will still further delay compliance? If the company persistently and flagrantly seeks delay, is it to be excused from compliance altogether because meanwhile costs have risen and compliance now would cost more than at the time of the making of the order? If it be now a real hardship to the gas company to comply with the order of the Commission, in consequence of general conditions affecting the whole nation which would not have been visited upon the company if it had performed in due season the public duty which this Commission and the courts have declared the company has been ignoring for a considerable period of time, shall on one side the company be absolved from the consequences of its own delay and indulged in continued failure to perform its adjudicated obligation, while, on the other side, the public continues to suffer the hardship which the Supreme Court points out the company has long inflicted through withholding a service to which these homeowners have been, and are, indisputably entitled? Upon whom, even under the present trying circumstances, shall be visited the consequences of the company's delay, indifference and violation of duty? These interrogations I do not find it necessary to decide in disposing of this application for a rehearing. There is nothing of substance set out in this petition which calls for further taking of testimony concerning the propriety of the original order. The company has made no showing of facts in behalf of a reconsideration of the order of March 19, 1915. Certain matters are indicated in the petition which, if sustained by facts, might lead the

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Commission to the view that a company which had accepted the order and evinced an intent to comply with it in good faith might be entitled thereupon to an extension of time. Even the company's unconscionable delay and its flagrant defiance of its adjudicated obligations will not lead this Commission to seek to compel its compliance now under conditions which might add eventually to the expense-burdens of its consumers. And of course no Commissioner would try to compel the laying of gas mains at a time when the ground is frozen.

I accordingly recommend that an order, in the form submitted herewith, be adopted, denying the company's present application for a re-hearing. In so doing, I feel that the Commission should make clear its willingness and purpose, on suitable application by the company, to consider any facts deemed by it to warrant any needed extensions of time to begin or complete an intended compliance with the company's franchise obligations as directed by the Commission's order. If the company now makes known its desire and purpose, seasonably and in good faith, to do what it should in conscience have done long ago, and presents to the Commission any facts by virtue of which it believes its time should reasonably be extended, the Commission will consider such a request for extension, in the light of whatever facts regarding material-supply, labor shortage, war-time financing, and the like, as are brought to its attention upon such application. Despite the long delay which has already taken place, and despite the fact that the company has only itself to blame for what it says is its present plight regarding prospective cost of compliance, I am sure that there is no disposition on the part of the Commission to fail to realize that current conditions call for less than usual rigidity as to dates within which construction work will be done, and any requests for time reasonably required will be considered on their merits.

I recommend the adoption of an order denying the application for a rehearing, and also an order fixing new dates for the beginning and completion of performance, the dates fixed by the order

of March 19, 1915, having expired while the matter was in the courts. The fixation of new dates is of course without prejudice to such an application by the company as I have indicated, if it deems the facts to warrant an extension beyond the dates now fixed.

In the Matter of the Application of the CITY OF NEW YORK for a Determination as to the Manner in which East Two Hundred and Thirty-eighth Street between Webster Avenue and Bullard Avenue shall be Carried Across the Tracks of the New York and Harlem Railroad Company, Leased to and Operated by The New York Central Railroad Company, and the Tracks of The New York, New Haven and Hartford Railroad Company

Case No. 2253

(Public Service Commission, First District, February 4, 1918)

The statutory provisions do not make any distinction whatever between the construction of a new street across a railroad where a crossing at grade is possible or practicable and the construction of a new street where such a crossing at grade is not possible or practicable.

The only question submitted to the Commission at this time is as to whether the proposed continuation of East Two Hundred and Thirty-eighth street, from Bullard avenue to Webster avenue, in the borough of The Bronx, New York city, shall be carried across the tracks of the New York, New Haven and Hartford Railroad Company and the tracks of the New York and Harlem Railroad Company (leased to and operated by the New York Central Railroad Company) over or under said railroads or at grade. In case the Commission decides upon an overhead crossing the material of the bridge or structure by means of which such street or new portion of a street shall be carried across such railroad and the approaches thereto shall be determined by the Commission. The railroad company, however, questions the jurisdiction of the Commission. Section 90 of the Railroad Law provides, among other things, that the Public Service Commission is authorized and required, in the matter of the construction of a new street extension, to determine whether such street or new portion of a street shall be constructed over or under the railroad or at grade. The Grade Crossing Act of 1897 (chapter 754) provided a complete scheme as to crossings, whether the tracks of the railroad cross streets already laid out or streets newly laid out, opened or extended across the tracks of a railroad already in existence, or the change in the grade of an existing crossing, and commits the regulation

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of the manner of making and constructing such crossing to the Railroad Commissioners, who are given authority in the premises.

Held, that the challenge by the railroad company of the Commission's jurisdiction cannot be sustained and that the statute directing application to be made to the Commission for a determination as to the manner of crossing is all-inclusive in its terms and admits of no exception. The Commission is virtually enjoined by the statute from delaying a decision in this proceeding, to afford interested parties an opportunity to reconsider the bearings of the construction of the bridge at Two Hundred and Thirty-eighth street upon the situation at East Two Hundred and Forty-first street. The application of the city for an order granting and setting forth the determination of the matter provided for in the statute made, after which the city may take up and consummate with the railroad company any contract or agreement it sees fit with respect to these crossings, in lieu of a continuance of work merely under the order now authorized. Such an agreement between the companies and the city would enable many readjustments of undoubted public advantage to be accomplished. Order made embodying the conclusions set forth in the opinion.

HUBBELL, Commissioner.— Application has been made by the city of New York, under section 90 of the Railroad Law, for a determination by this Commission as to whether the proposed continuation of East Two Hundred and Thirty-eighth street from Bul-lard avenue to Webster avenue in the borough of The Bronx, city of New York, shall be carried across the tracks of the New York, New Haven and Hartford Railroad Company, and the tracks of the New York and Harlem Railroad Company (leased to and operated by the New York Central Railroad Company) shall be over, or under, said railroads, or at grade. The determination of this question is the only one submitted to this Commission at this time. The statute further directs that in case the Commission decides that an overhead crossing shall be established, it shall then "determine the height, length and material of the bridge or structure, by means of which such street or new portion of a street shall be carried across such railroad, and the length, character, and grade of the approaches thereto." The jurisdiction of this Commission, however, has been challenged by the railroad companies, and will be adverted to hereafter.

The city has been made by the Legislature the sole judge of the necessity of the proposed crossing (*People ex rel. Ithaca v. Delaware, Lackawanna & Western R. R. Co.*, 11 App. Div. 280; *Matter*

of Board of Public Works of Rome, 5 P. S. C. R. 2d Dist. N. Y. 326), and its determination as to such necessity is appealable to the Appellate Division. Matter of Delevan Avenue, 167 N. Y. 256. The Commission's function with reference to the construction of the street across the tracks is limited to the exercise of the powers vested in it by the statutory provisions contained in the Railroad Law, and any review of the municipality's determination as to the necessity of opening the street across the railroad is not within the delegated powers of the Commission. Upon that question, the Commission is bound by the city's action.

Section 90 of the Railroad Law, under which this proceeding was brought by the city of New York, provides among other things that before or in connection with affording the legal basis for the construction of a street across a railroad:

1. When a new street or new portion of a street is to be constructed across a steam surface railroad, such street or new portion of such street shall pass over or under such railroad or at grade, according as the Public Service Commission shall determine and direct.

2. If the municipality desires to construct a new street or new portion of a street across a railroad, notice of its intention to lay out such street or new portion of a street across the railroad shall be given to the railroad company by the municipal corporation at least fifteen days prior to the making of the order laying out such street or new portion of a street, by service personally on the president or vice-president of the railroad corporation or any general officer thereof.

3. If the municipal corporation determines such street or new portion of street to be necessary, the municipal corporation is then to apply to the Public Service Commission before any further proceedings are taken to determine whether such street or new portion of a street shall pass over or under such railroad or at grade.

4. After such hearing, the Public Service Commission is authorized and required to determine whether such street or new portion of a street shall be constructed over or under the railroad or at grade.

5. If the Commission determines that such street or new portion of a street shall be carried across such railroad above grade, then the Commission is to determine the height, the length, and the material, of the bridge or structure by means of which such street or new portion of a street shall be carried across such railroad, and the length, character and grades of the approaches thereto.

6. The decision of the Commission rendered in any proceeding under this statute is mandatorily required to be communicated within twenty days after final hearing, to all parties to whom notice of hearing in such proceeding was given or who appeared at such hearing by counsel or in person.

7. The city is thereupon to proceed to acquire any necessary rights, and when that has been done by the city, the company is to construct the bridge or viaduct. If there is nothing done, the Commission is empowered to institute mandamus proceedings to compel action.

All the requirements of the statute relating to the proceedings under consideration have been complied with.

JURISDICTION OF THE COMMISSION

At the place where the railroads would be crossed by the proposed highway, the tracks lie in a deep depression that has many of the aspects of a valley, and is, in fact, the extension of the valley of the Bronx through which the river of that name flows. The extension of the proposed highway across the tracks of the railroad companies at this point would be practicable only by the erection of a bridge about 35 feet above the level of the railroad tracks. The prevailing topographical situation must largely control the determination of the Commission as to whether the crossing shall be under or over the tracks. The width of the valley to be spanned, if a bridge is constructed, is approximately 2,000 feet. It is contended by the New York Central Railroad Company that the Commission is without jurisdiction in this matter, upon the ground that the purpose of the enactment of the provisions of the Railroad Law known as the "Grade Crossing Act" was to avoid or terminate, so far as practicable, the crossing of railroad

tracks by public highways at grade; that a proceeding under the Railroad Law for a determination as to the manner in which a new street or highway shall be carried across the railroad tracks is authorized by the statute only in cases where the construction of a crossing of an existing railroad track by a new street or highway at grade is possible or practicable; that there can be no sanction of a crossing above grade where the circumstances are such that a crossing at grade could hardly be accomplished as an engineering matter, leaving out the factors of safety; and that accordingly the construction of the Two Hundred and Thirty-eighth street bridge cannot be said to be necessitated for the purpose of *avoiding* or *eliminating* a grade crossing. It must be admitted that this proposed extension over the railroad tracks would have been made even if the tracks were not there, but the fact that *they are there*, and that the street must be extended either over or under grade, imposes the duty on this Commission of deciding which way it shall be extended, and of determining the other features specified in the statutes.

Urged as legal objections as to the Commission's jurisdiction and the order now asked for, I am unable to feel that the company's contentions are well maintained; their bearing is only upon the equities of the situation and the eventual apportionment of the expense. These equities will doubtless be considered in another proceeding when the proper adjustment will be effected. Literally, the statutory provisions do not make any distinction whatever between the construction of a new street across a railroad where a crossing at grade is possible or practicable and the construction of a new street across a railroad track where a crossing at grade is not possible or practicable. Section 90 of the Railroad Law applies to a new street or new portion of street thereafter to be constructed across a steam surface railroad, without qualification or exception, on account of the grade at which the extended highway can be carried across the railroad tracks. The contention of the New York Central Railroad Company cannot possibly be sustained by any express exception to be found in the statute embracing a case such as the present one, but if at

all tenable must be founded on an interpretation of the meaning and intent of the statute which would exclude the present case from the purview of its provisions.

Sections 88-99 of the Railroad Law, being chapter 481 of the Laws of 1910, which regulate crossings of railroads with streets and crossings of railroads with other railroads or street railroads, are a re-enactment, with various changes, of the provisions of chapter 754 of the Laws of 1897, entitled "An Act to amend the railroad law and the act amendatory thereof, relative to grade crossings." Chapter 754 of the Laws of 1897, amended the Railroad Law as enacted by chapter 565 of the Laws of 1890, by adding thereto sections 60-69, relative to grade crossings, which correspond generally to sections 89-98 of the present Railroad Law.

Prior to the enactment of chapter 754 of the Laws of 1897, the extension of streets across railroad tracks was regulated by chapter 62 of the Laws of 1853 entitled "An Act to regulate the construction of roads and streets across railroad tracks." By chapter 62 of the Laws of 1853, it was declared to be lawful for municipal authorities to lay out a street or highway across the tracks of any railroad, "without compensation to the corporation owning such railroad," upon thirty days' notice to certain officers of the corporation, and it then became the duty of the railroad corporation "to cause the said street or highway to be taken across their track, *as shall be most convenient and useful for public travel*, and to cause all necessary embankments, excavation and other work to be done on their road for that purpose." A penalty of twenty dollars was imposed for every day's neglect, after the lapse of thirty days, to cause the necessary work to be done and completed. Up to July 1, 1897, when chapter 754 of the Laws of 1897 became effective, it was left solely to the discretion of the railroad company to determine the manner and method of carrying a street or highway across its tracks "as shall be most convenient and useful for public travel."

By chapter 754 of the Laws of 1897, a new State policy with regard to crossings of railroads was enunciated, and a radical change

was made in the procedure by which highways were to be carried across railroad tracks. As applied to street extensions across railroads it fixed a rule of apportionment of cost and responsibility for performing the work of construction and acquiring necessary property rights. Most significantly, however, it removed from the discretion both of the railroad and the city the manner and method of construction, and vested the judgment thereof in an independent administrative tribunal. The Grade Crossing Act of 1897 was construed by the Court of Appeals, with particular reference to the extension of streets across railroads, in *People ex rel. Niagara Falls v. N. Y. C. & H. R. R. R. Co.* (1899), 158 N. Y. 410, where Parker, Ch. J., said (pp. 413, 414): "The latter act (Ch. 754, L. 1897) radically altered the procedure by which highways are to be carried across railroad tracks, a change of procedure made necessary by the radical change in the public policy of the State looking towards the ultimate abolition of the crossing of highways at grade by the tracks of steam railroads. *It provides a complete scheme as to crossings, whether the tracks of the railroad cross streets already laid out or streets newly laid out, opened or extended across the tracks of a railroad already in existence, or the change in the grade of an existing crossing, and commits the regulation of the manner of making and constructing such crossing to the railroad commissioners, who are given authority to determine whether a given street, avenue or highway shall pass over or under a railroad, or at grade.* A municipality may desire that it be so taken, to save expense to itself or for some other reason, but the power to determine whether its wish shall be given effect has, since the 1st day of July, 1897, been committed to the judgment of the railroad commissioners. * * * The act of 1853 was repealed by that of 1897, and therefore, since the 1st day of July of that year the procedure provided by the latter act must be resorted to in all attempts to take a street across the tracks of a steam railroad—a procedure that requires, in the first instance, a determination by the railroad commissioners whether the street shall pass under or over the tracks of such a corporation, or at grade."

Mr. Justice Herrick holds to the same effect in *Matter of Village of Waverly*, 35 App. Div. 38 (1898).

In *People ex rel. City of Niagara Falls v. New York Central & Hudson River Railroad Co.*, 52 N. Y. Supp. 234 (1898), the Appellate Division, speaking particularly of the street extension provision of the Railroad Law, said, per Hardin, P. J. (p. 235): "Apparently the statute inaugurated a system by which the railroad commissioners were to be consulted and to determine the manner of crossing steam roads from and after the act took effect."

Such a vital prerequisite to the effective laying out of a highway is the determination by the Commission of the relative grades of the highway and the railroad which it is proposed to cross, that after a municipality has laid out a street across a railroad, it can take no further proceedings *whatever* until it has obtained the determination of the Public Service Commission as to the manner of crossing. In *Matter of City of New York (West 134th Street)* 204 N. Y. 465 (1912), the Court of Appeals, per Haight, J., said (p. 469): "It will be observed that, under the provisions of this statute, after a municipal corporation determines a street, avenue, or highway to be necessary 'it shall then apply to the board of railroad commissioners before any further proceedings are taken, to determine whether such a street, avenue or highway shall pass over or under such railroad or at grade.' It is difficult to conceive of language that would more clearly indicate the legislative intent than that above expressed, 'before *any* further proceedings are taken.' What proceedings? *Any* proceedings; and yet the Appellate Division has reached the conclusion that this statute does not mean further proceedings to acquire the title to the land. In this conclusion we think that the learned Appellate Division erred."

The determination of the grade of crossing is by no possibility left either to the municipality, the railroad company, or both. The mere fact that the municipality and the railroad company have agreed upon crossing of a railroad by an overhead bridge and the apportionment of the cost of construction, and have thereby avoided any question of dangers by a grade crossing,

does not obviate the necessity of making application to the Commission, as was held in *Brush v. N. Y., N. H. & H. R. R. Co.*, 218 N. Y. 264 (1916), the court, per Willard Bartlett, Ch. J., saying (p. 268): "The omission to take the steps prescribed by the statute in this respect rendered the opening of this new portion of Baychester avenue unlawful and as the construction of the bridge and its approaches was an integral part of such opening their erection was also unlawful. It matters not that the railroad company and the municipal authorities had come to an agreement between themselves as to the manner in which the new portion of Baychester avenue should be opened and the crossing effected. They could not substitute their determination for that of the official body *to whom the law had committed the decision of all questions as to the manner or method of carrying a new portion of a street across a steam surface railroad.*"

Careful inspection of the physical conditions prevailing on the line of the proposed extension of Two Hundred and Thirty-eighth street compels the adoption of the overhead crossing. Any other disposition would be impossible of consideration. The fact, however, does not release the Commission from its duty to determine how the proposed extension shall be made. This was expressly determined in *Matter of Town Board of Royalton* (1910), 138 App. Div. 412.

The railroad company's counsel, in his brief, quotes from *Albany Northern R. R. Co. v. Brownell*, 24 N. Y. 345, 350, and from *City of N. Y. v. N. Y. & Harlem R. R. Co.*, N. Y. L. J. Jan. 22, 1917; *affd.*, App. Div. (not yet reported) to the effect that the disturbance of the surface of the ground, which had rendered necessary the work of making excavations or embankments for taking the highway across the railroad, was effected by the railroad itself, and there was, therefore, nothing unlawful in obliging the railroad company to perform the work, and it was the presence and use of railroad tracks that made an elevated highway necessary, and, therefore, it was proper to require the railroad company to bear a part of the expense of constructing the highway under the provisions of the Railroad Law.

These quotations do not negative the applicability of the present statutory provisions to the instant case. It is to be observed that the present statute does not stop, in providing for the protection of the public, at merely removing from the discretion of the city or the railroad company and vesting in the commission the determination of the grade of the crossing of a railroad by a highway, but requires the Commission, in case it determines upon an overhead crossing, also to "determine the height, the length, and the material of the bridge or structure by means of which such street or new portion of a street shall be carried across such railroad, and the length, character and grade of the approaches thereto," and the Commission has a continuing duty in supervising the work of construction, approving the plans therefor, letting contracts and passing upon the completed work. The State's concern in the public safety is materially involved in the additional matters as to which the Commission is required in the proceeding before it to make a determination. And the details thus to be determined by the Commission are essentially related to railroad operation, which involves the safety of those using the railroad. In *C. & N. W. Ry. Co. v. Chicago*, 140 Ill. 309; 29 N. E. Rep. 1109, the court said: "It is proper that the portion of the street or highway which is within the limits of the railroad right of way should be constructed by the railroad company and maintained by it, because of the dangers attending the operation of its road. It should control the making and repairing of the crossing for the protection of those passing along the street and of those riding on the cars."

Counsel for the railroad company has cited in support of the point raised by him further cases decided in other State jurisdictions. *People v. Lake Shore & Michigan Southern Ry. Co.*, 5 Mich. 277, 17 N. W. Rep. 841; *Gage v. Township of Pittsfield*, 79 id. 687; *State v. Chicago B. & Q. R. Co.*, 45 id. 469. I have examined these cases, and do not find them to weigh against my conclusion that the New York statute applies to the Two Hundred and Thirty-eighth street extension. It is not necessary to review these cases in detail, but extensions of the disjointed

excerpts quoted from some of them disclose a different meaning and effect from that ascribed to them. The cases do not, in my opinion, support the propositions indicated by the brief excerpts. A comprehensive discussion of the judicial precedents and the contentious points raised in cases involving the respective obligations and rights of the railroads and public authorities in grade crossing problems is contained in the opinion of the Minnesota Supreme Court in *State ex rel. City of Minneapolis v. St. Paul M. & M. Ry. Co.* (1906), 108 N. W. Rep. 261, cited by counsel for the New York Central Railroad Company, in which the court pertinently said (p. 266): "6. Counsel for defendants attempted to distinguish many of the cases cited as supporting the contention of the relator, on the ground that they involved grade crossings only. The cases cited from Tennessee, Indiana, and Mississippi involved the construction of bridges over the tracks of the railroad company, but as urged by counsel the other cases concerned only grade crossings. But there can be no difference on principle in so far as an exercise of police power is concerned, between a grade crossing and a bridge over the tracks. The difference between the two is one of degree, relating solely to the matter of expense. But the expense incident to a compliance with police regulations is not an element of consideration, except, perhaps, where arbitrary and unreasonable, or resulting in a practical confiscation of property. Cases where one railroad crosses another have no application, because both stand on an equality respecting rights and obligations, while in cases like that at bar the rights of the public are superior."

I am of the opinion that the challenge by the railroad company of the Commission's jurisdiction cannot be sustained. The statute directing application to be made to the Commission for a determination of the manner of crossing, as construed by the courts, is all-inclusive in its terms and admits of no exception. Both the language of the statute and the judicial decisions thereon disclose a legislative intent to require application to be made to the Public Service Commission for a determination as to the manner of crossing in every case where a new street is to be con-

structed across a railroad. The effect of such a holding as is urged by the New York Central Railroad Company would be to make the city, in carrying a street across a railroad, the judge as to whether an application should be made to the Commission or not, and as to the character and kind of the construction of a highway bridge over a railroad. The policy declared by the law was to make the Commission the sole judge, subject to appeal to the Appellate Division of the Supreme Court, of what shall be done in every case where a street is to be carried across a railroad. The fact that in the present case the evidence leads irresistibly to the conclusion that one treatment is possible, makes no difference.

APPORTIONMENT OF EXPENSE

The further contention is made that even if the Commission has jurisdiction, yet in view of the fact that the railroad tracks occupy only a part of the space between the bluffs, it should now be determined that there can be charged to the "elimination account," and apportioned in accordance with the provisions of the Railroad Law, only the cost of spanning the rights of way of the railroad company. The considerations which the railroad company urges as having the force of legal rule have in fact a degree of merit, in connection with the apportionment of the expense. I can see considerable merit in the railroad company's contentions on the equities, however unsupported they are, when urged as objections to the Commission's jurisdiction.

The question of apportioning the expense need not be passed upon at this time but is to be left to be determined on the accounting which must be had after the work is done, or at an intermediate stage of actual construction. Railroad Law, § 94. These elements will then be considered. It is further submitted that even should the Commission now undertake to apportion the relative expense to be assumed by the railroad companies and the city, that such attempted determination would not be conclusive or binding upon all the interests involved. The present decision of the Commission does not carry with it any implica-

tion adverse to the contention presented by the railroad companies, that the cost of constructing the portions of the bridge exterior to the railroad right of way lines must be borne wholly by the city of New York, but holds merely that the question is one to be determined upon an accounting.

DETERMINATION OF DETAILS OF BRIDGE

It was suggested, upon the hearing, by the engineer representing the president of the borough of The Bronx, that at this stage of the proceeding the Commission should not determine the details of the bridge and approaches. For a decision of the application here made, the statute requires the Commission to determine the height, the length and material of the bridge, and the length, character and grades of the approaches, and the decision would be incomplete without such a determination. *Matter of Town of Royalton*, 138 App. Div. 412, 414.

EAST 241ST STREET VIADUCT

Consideration of the proceedings in relation to the Two Hundred and Forty-first street viaduct has no bearing upon the duty imposed upon the Commission by the law in connection with consideration of the proposed extension of Two Hundred and Thirty-eighth street. It may, however, be profitable at this point to call attention to the disposition made of the Two Hundred and Forty-first street matter, as set forth in the following excerpt of the opinion appearing in 8 P. S. C. R. 1st Dist. N. Y. 123, 127 — May 14, 1917: "It in nowise appeared that through action of the State Legislature and the city authorities, the facts of the situation had been changed or the Commission placed in position to bring about by order such an outcome as the petitioners desired. East Two Hundred and Thirty-eighth street has not yet been opened by the city authorities as a street over the railroad tracks; half of the portion of East Two Hundred and Thirty-eighth street west of the tracks still remains a part of the city of Yonkers rather than of the city of New York; and the borough authorities

have not yet worked out any arrangement with the New York Central Railroad Company whereby the principal viaduct may be located at East Two Hundred and Thirty-eighth street and some secondary form of access be provided to the new station which has been built at East Two Hundred and Forty-first street. On the other hand, the city, through its assistant corporation counsel, made known at the contemplated rehearing, for the first time, its intention to carry to the Court of Appeals its appeal from the order of August 3, 1915, unanimously affirmed by the Appellate Division for the First Department, although the order of April 11, 1917, was determined upon by the Commission on the distinct representation that the city, through the borough authorities, would seek its solution of the problem through bringing to pass such changed circumstances as would enable the Commission to deal with the East Two Hundred and Thirty-eighth street situation through a voluntary agreement between the city, the railroad company and the Commission, with the instituting of a new proceeding as to East Two Hundred and Thirty-eighth street, if necessary.

"Inasmuch as the requisite steps have not yet been taken by the city, and the city has served notice of appeal to the Court of Appeals, there is nothing before the Commission which could warrant a change at this time in the determination previously made, and the rehearing will accordingly be declared closed, without prejudice to a reopening should the city at any time work out the situation so as to warrant consideration of the propriety of a different arrangement with respect to these two thoroughfares."

Since then, the order of the Commission was affirmed by the Court of Appeals, by a decision rendered December 5, 1917, and in view of the termination of the litigation and the settlement of the legal questions therein raised and of the determination herein made, the Commission will be in a position to consider a renewal of the application for reopening the Two Hundred and Forty-first street proceeding and granting such relief as may be warranted by the merits of any new or additional facts.

The company has done nothing beyond the preparation of plans towards the construction of the East Two Hundred and Forty-first street viaduct.

POSTPONEMENT OF DECISION

However, the Commission is virtually enjoined by the statute from delaying a decision in this proceeding to afford interested parties an opportunity to reconsider the bearings of the construction of the bridge at Two Hundred and Thirty-eighth street upon the situation at East Two Hundred and Forty-first street. The statute expressly provides that: "The decision of said commission rendered in any proceeding under this section shall be communicated within twenty days after final hearing to all parties to whom notice of the hearing of such proceeding was given, or who appeared at such hearing by counsel or in person."

I submit, therefore, and recommend for entry by the Commission, an order granting the application of the city, and setting forth the determination of the matters provided for by the statute. The city may then take up and consummate with the railroad companies any contract or agreement it sees fit, with respect to both the East Two Hundred and Thirty-eighth and the East Two Hundred and Forty-first street crossings, in lieu of a continuance of work merely under the order now authorized. Such an agreement between the companies and the city would enable many readjustments of undoubted public advantage to be accomplished.

THE NEED FOR AN ADJUSTMENT BY AGREEMENT

I am, in fact, the more inclined to advise an immediate determination of the matter by this Commission, through the granting of the application now before the Commission from the city, by reason of the fact that a really unjust and indefensible situation would otherwise be perpetuated. That there should be a crossing *either* at East Two Hundred and Thirty-eighth street or at East Two Hundred and Forty-first street is beyond question. Yet for years the matter has been confused and has dragged on, and nothing has been done to provide a crossing at either place. It was ordered in 1915 by the then Commission to construct an over-

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head crossing at East Two Hundred and Forty-first street. Undoubtedly there should be at that point either a viaduct for all classes of traffic, or at least a footbridge or means of crossing for pedestrians, but the railroad company has built neither. It has merely gone ahead with, and completed some of the railroad improvements provided for in the order, but has not even begun the construction of a crossing which would serve the convenience of the general public. For many reasons, from the viewpoint of city planning and the development of the natural avenues of traffic, the location of the principal viaduct at East Two Hundred and Thirty-eighth street would be preferable, now that the way has been cleared to make that possible. The railroad company ought not in fairness to have to assume expense in connection with two bridges in this neighborhood, although that may be the outcome if the matter is not properly dealt with. There is great need that a prompt, fair, business-like adjustment of the whole matter be reached by the railroad company and the city. For the reason, among others, that I feel that the entry of an order embodying the conclusions set forth herein will tend to aid and compel such a solution through some mutually fair agreement, I recommend decision now, instead of holding the matter up pending an adjustment unlikely to follow from any less constraint.

Upon the foregoing opinion the Commission made the following order:

BY THE COMMISSION.—Application having been made to this Commission by the city of New York by resolution of the board of estimate and apportionment adopted September 21, 1917, for a determination as to the manner in which a certain proposed new street, namely, East Two Hundred and Thirty-eighth street from Bullard avenue to Webster avenue in the borough of The Bronx, city of New York, shall be opened, extended or constructed across the tracks of the New York, New Haven and Hartford Railroad Company and the tracks of the New York and Harlem Railroad Company (leased to and operated by the New York Central Railroad Company), whether over or under said railroads or at grade:

And the Commission having appointed Thursday, December 20, 1917, at 2.30 o'clock in the afternoon as the time and the hearing room of the Commission at 120 Broadway, borough of Manhattan, city of New York, as the place for a hearing upon said application, and having given notice of such hearing as required by law to the railroad corporations whose railroads are to be crossed by such new street, to the municipal corporation and to the owners of land adjoining the railroads and that part of the street to be extended across said railroads;

And a hearing having been duly had upon said application at the place aforesaid on December 20, 1917, and January 14, 1918, Frank J. Price and Vincent Victory, assistant corporation counsel, appearing for the city of New York in support of said application, Charles M. Sheafe, Jr., appearing for the New York, New Haven and Hartford Railroad Company, and George H. Walker appearing for the New York and Harlem Railroad Company and its lessee, the New York Central Railroad Company; and the Commission being of the opinion from a careful consideration of the evidence including the various maps and papers filed in this proceeding and after a personal inspection of the locality that said new street should be carried across said railroads above grade by means of an overhead bridge for general traffic; ordered:

(1) That this Commission determines under section 90 of the Railroad Law that East Two Hundred and Thirty-eighth street from Bullard avenue to Webster avenue in the borough of The Bronx, city of New York, shall cross the tracks of the New York, New Haven and Hartford Railroad Company and the tracks of the New York and Harlem Railroad Company (leased to and operated by the New York Central Railroad Company) above the grade of such railroads and on an overhead bridge for general traffic, such bridge to be a steel and concrete bridge not less than eighty feet in width and to be constructed together with its approaches substantially as shown on plan and profile received in evidence as Exhibit No. 5 on the hearing had in this matter, which plan and profile bears the following endorsement:

"CITY OF NEW YORK, BOROUGH OF THE BRONX,

"Office of the President,

"Topographical Bureau,

"PLAN AND PROFILE

of

"EAST 238TH STREET

"from Bullard Ave. to Webster Ave.

showing the relation of the proposed grade to the tracks of the N. Y., N. H. & H. R. R., and Harlem R. R. to accompany the plan laying out East 238th Street between Bullard Ave. and Webster Ave. dated June 22, 1917.

"E. H. HOLDEN

"*Acting Topographical Engineer*

"R. H. GILLESPIE

"*Chief of Sewers and Highways*

"JOHN G. BORGSTEDT

"*Acting President of the Borough of The Bronx*

"Dated: July 28th 1917

8-6-17"

(2) That before proceeding with the construction of said bridge and its approaches or letting any contract for the construction thereof said railroad corporations shall submit to this Commission for its approval detailed plans and specifications of such bridge and its approaches showing the height, length, width and material of said bridge and the length, character, grades and material of the approaches thereto, and shall procure the approval thereof by this Commission.

(3) That in case the work of constructing said bridge and its approaches is to be done by contract, the proposals of contractors shall be submitted to this Commission for its consideration in order that the Commission may approve such bid as it may deem proper and in order that it may require the submission of new proposals in case it shall determine that all the bids submitted are excessive.

(4) That nothing in this order contained shall be construed or urged as a determination by the Commission as to the amount of expense of making the crossing above the grade of the rail-

roads, or as to the amount of such expense which shall be paid by the city of New York or by the railroad companies; the determination of all questions as to the expense and the apportionment thereof being specifically reserved for the accounting proceeding to be subsequently had pursuant to subdivision 7 of section 94 of the Railroad Law.

In the Matter of the Hearing on the Motion of the Commission
Concerning the Rates and Charges of the NEW YORK STEAM
COMPANY in the Borough of Manhattan, City of New York

Case No. 2252

(Public Service Commission, First District, February 25, 1918)

Determination as to the right of a steam company to abrogate contracts made with customers for a fixed term and at specified rate and service. As to whether the basic rates of the schedule which customers of the New York Steam Company may be lawfully charged are unjust, unreasonable, unjustly discriminatory or unduly preferential.

Examination of authorities relating to the rates and service in cases similar to that under consideration.

Specific schedules of rates and service proposed by New York Steam Company.

The New York Steam Company, on the 1st day of May, 1917, promulgated revised rates for steam service, involving an advance to go into effect on the first day of June of that year. On May 28, 1917, it issued and served upon its customers a circular letter enclosing a copy of the new schedules and stating, among other things, that owing to the greatly increased cost of steam generation due to increased cost of fuel, labor and supplies, the company found it absolutely necessary to advance its rates in order to protect the company against enormous losses. The proposed new rates were not in accord with the existing contract between the company and its customers and some of the latter complained to the Commission.

The questions herein involved number two, the more important being as follows: May a steam company after making contracts for supplying steam for a fixed term at specific rates and for a minimum quantity of consumption abrogate such contracts, whether or not they were made pursuant to the company's legally established rate schedule. The other question is as to whether the proposed rates are unjust, unreasonable, unjustly discriminatory or unduly preferential.

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Whether a proposed rate is unlawful in the sense of being excessive depends upon all the circumstances and conditions that are recognized as having a legitimate influence in rate making.

Adjudications establishing these basic principles—under the circumstances herein shown and in conformity with said holdings, *Held*:

1. That the act of the New York Steam Company in canceling, by its notice of May 28, 1917, contracts made under the schedule effective November 1, 1916, was unjust and unreasonable.

2. That the schedule of June 1, 1917, is unjust, unreasonable and unlawful in so far as it does not provide a separate classification for contracts in force on that date and made in conformity with the schedule effective November 1, 1916.

3. That the company should be directed to file a supplement to the schedule of June 1, 1917, which shall provide that all contracts made in conformity with the schedule effective November 1, 1916, and outstanding on June 1, 1917, unless thereafter canceled by mutual consent, shall be in full force and effect.

WHITNEY, Commissioner.—On May 1, 1917, the New York Steam Company issued and posted a new schedule of rates for steam service within the borough of Manhattan which became effective on June 1, 1917. By this schedule, the rates of the New York Steam Company for all classes of its patrons were increased, and various changes were made in the terms and conditions of the several forms of contract which had been provided in the superseded rate schedule. Before the new schedule became effective and on May 28, 1917, the company sent a circular letter to its customers enclosing a copy of the new schedule and stating, in part, as follows:

“* * * Please take notice that all of the provisions as to Rates, Terms and Conditions, contained in said new schedule are applicable to all existing service agreements, applications, and term contracts, of whatsoever nature, date, or period, for service rendered on and after June 1, 1917, and until further notice.
* * *

“We further desire to call your attention to the fact that owing to the greatly increased cost of steam generation during the past year—due to increased cost of fuel, labor, and supplies—we have found it absolutely necessary to advance our rates in order to protect the company against enormous losses. * * *

"Notwithstanding the fuel and labor situation, which is perhaps without precedent in this country, we feel confident we can continue to furnish our consumers an uninterrupted and economical service, for the reason that we are providing greatly increased coal storage facilities, and propose to take every precaution against a possible interruption in the service due to lack of fuel or labor troubles. * * *

Thereafter, various consumers complained to the Commission of the abrogation of the existing contracts which they had made with the steam company for a definite term, at specified rates and for a minimum quantity to be consumed during the term or stated periods, and the Commission on its own motion thereupon instituted this proceeding for the purpose of inquiring and determining whether the rates and charges demanded, charged or collected were unjust, unreasonable and unjustly discriminatory or unduly preferential.

The issues raised in this proceeding fall within two separate questions which are susceptible of independent consideration and determination, viz.: (1) May a steam company after making contracts with its customers for the supply of steam for a fixed term at specified rates and for a minimum quantity of consumption, involving mutual covenants, nevertheless abrogate such contracts, whether or not they were made pursuant to and in accordance with the company's legally established rate schedule, and (2) are the basic rates of the schedule which any or all consumers of the steam company may be lawfully charged unjust, unreasonable, unjustly discriminatory or unduly preferential?

The issues with respect to the effect of the new schedule upon outstanding contracts have, after full opportunity of hearing to all interested parties, been submitted, and that question is now before the Commission for decision. With respect to the reasonableness generally of the basic rates and charges set forth in the schedule, further hearings are to be held, and no determination thereon is here made.

The company urges that all term contracts of a public utility are subject to a lawful change in the rate in the manner prescribed

by law, although that change may have been voluntarily effected by the utility itself. It is conceded, however, that the rates, charges, acts and regulations contained in the new schedule may after a hearing by the Commission be declared unreasonable and discriminatory. In substance, the contention is that, as long as the new schedule is permitted to be in effect, it is binding upon all alike irrespective of the fact that prior contracts between the steam company and its customers fixing different rates have not expired.

Nevertheless, the question here presented is whether the new schedule, in its application to service already governed by the prior lawful and unexpired contract, in the first place, should have been put into effect by the steam company and, in the next place, should be permitted by this Commission to remain in effect. The Commission must in this proceeding inquire into and determine whether the new schedule is in fact unlawful and unjust in failing to give due recognition to the continued validity of the term contracts, and whether the Commission should not order a supplement to be filed which will effectuate such a result.

The distinction between a legal and a lawful schedule has been pointed out in several decisions of the Interstate Commerce Commission. In *Poor Grain Co. v. Chicago, Burlington & Quincy R. R. Co.*, 12 I. C. C. 418, 425, the Interstate Commerce Commission said: "A rate may be lawful in the sense that it is the regularly published rate and therefore the only rate under which traffic may lawfully move, and yet at the same time be unlawful in the sense that it is excessive and unreasonable in amount. Its lawfulness as the published rate is to be tested by the mere inspection of the schedules on file with the Commission; and if found to have been published in conformity with the requirements of law that rate must in all cases be charged and actually collected by the carrier even though it may be excessive. Whether or not it is unlawful in the sense of being excessive depends upon all the circumstances and conditions that are recognized as having a legitimate influence in rate making."

In *Arkansas Fuel Co. v. Chicago, Milwaukee & St. Paul Ry.*

Co., 16 I. C. C. 95, 97, the Interstate Commerce Commission made this very pertinent statement: "It is provided in section 6 of the act (Interstate Commerce Act) that no carrier shall collect or receive a greater or less compensation than the rates specified in the tariff in effect at the time of the movement. Other provisions of law make it a misdemeanor for the carrier to depart from the published rate. In dealing with shippers the carrier is therefore required to conform the freight charges actually collected to the amount fixed in its published tariffs. In that sense the published rate in effect at the time of the movements is therefore the legal rate. It is what the letter of the law requires the shipper to pay and the carrier to collect.

"But the first section of the act, following the rule of the common law, declares that all charges for services rendered by a carrier in the transportation of passengers or property shall be reasonable and just. It also declares every unjust and unreasonable charge for such a service to be unlawful. In publishing a rate or a schedule of rates the carrier therefore acts under this admonition of the statute. If it promulgates a rate in violation of this injunction, that is to say, if it establishes a rate that is excessive and therefore unjust and unreasonable, it is not a lawful rate when its reasonableness is subsequently questioned upon complaint filed. While it may be, and indeed is, the legal rate—the rate that must be paid by the shipper and collected by the carrier because it is the published rate—the mere publication cannot make a rate lawful that is unreasonable and excessive. No rate can be lawful, in the sense of being immune from attack, either with respect to past or future shipments, if it be excessive and unreasonable in amount."

Provisions similar to those referred to in the cases decided by the Interstate Commerce Commission are found in sections 79 and 80 of the Public Service Commissions Law hereinafter set forth, and the interpretation of the purport of the Federal statute should be applied here. It is, in my opinion, correct that, under the provisions of section 80 of the Public Service Commissions Law, the steam company had the power to file the schedule of

June 1, 1917, and that, as long as that schedule remains in effect, the rates therein specified must in all cases be charged and collected although the charge that they are unlawful, unjust, unreasonable and discriminatory may be well founded. But, upon proper procedure, the rates or schedule may be found and declared to be unlawful, and may become, in respect of service furnished while such rate or schedule is in effect, the basis of a claim for reparation. In other words, there is a difference between holding that all service and contracts must conform with filed schedules and holding that the schedules are inherently unlawful or unreasonable.

This Commission has no power to suspend schedules of steam companies and it was not obliged to hold hearings and determine the legality of any provision of the schedule within the thirty days intervening between the issuance of the schedule and its effective date. That period intervened so that ample notice might be given of the contemplated changes. The Commission can at any time inquire into the lawfulness or reasonableness of any provisions of the schedule.

With these principles in mind the facts in this proceeding will be considered to determine what, if any, relief should be granted.

As the various contracts outstanding on June 1, 1917, between the company and its consumers were dissimilar in form and content and were made at various times and under various schedules, the effect of the filing of the new schedule upon some of the contracts may well be different than upon others, and the measure of relief to be granted may not be the same. Accordingly, a statement of the history of the company's schedules and contracts is necessary to a determination of the questions presented.

On November 24, 1914, and in pursuance of the provisions of subdivision 10 of section 80 of the Public Service Commissions Law, the Commission made an order in Case No. 1890 requiring every steam corporation to file with the Commission, at least thirty days before any schedule of rates or forms of contract go into effect, printed schedules showing all rates and charges made, all forms of contract or agreement, and all rules and regulations

relating to rates, charges or service used or to be used, and all general privileges and facilities granted or allowed. The order further provided, in detail, as to the form and contents of the schedule. On December 26, 1914, the company filed with the Commission a document entitled, "Schedule Showing the Present General Meter Rates for Steam Supplied," and also filed several forms of contract which were then in use by the company. These papers did not in form or in substance comply with the statute or with the filing order of the Commission in Case No. 1890. On June 26, 1916, the company filed with the Commission another document entitled "Temporary Schedule of Rates," by which the company intended to increase its then effective rates. As this document was not considered by the Commission as complying with the filing order and statute, a proceeding was instituted in Case No. 2151 to inquire whether the company had violated the law by advancing the price of steam without filing a schedule in accordance with the filing order and the statute. In accordance with the ruling made by me at the hearing in the latter proceeding that neither the schedule of December 26, 1914, nor the supplement of June 26, 1916, complied with the requirements of the statute and the terms of the Commission's order prescribing the form and contents of rate schedules, the company issued and posted, on October 31, 1916, a new schedule which, under permission granted by the Commission, became effective on November 1, 1916, upon less than thirty days' notice. The schedule, in form, complied with the requirements of the filing order and the statute. It contained a schedule of general rates used in calculating the monthly bills as measured by meter and also contained forms of contract for use respectively by annual power consumers, apartment house consumers, and summer power consumers. In addition, it contained a schedule of "other rates" and "guaranteed steam consumption for annual power contract consumers" which purported to apply to contracts already in force and which did not expire prior to November 1, 1916. The form of contract used for annual power consumers appears in the schedule annexed hereto. The contract for summer power consumers was essentially similar in form.

This schedule, which became effective November 1, 1916, remained in effect without change until April 14, 1917, when the company, as a result of a special permission, put in effect a supplement providing for the following contract rider to be attached to all service applications or contracts made *on and after April 14, 1917*, and to all renewals of applications or contracts expiring *on and after that date*:

"It is understood and agreed that in the event of any change or modification in the Service Charge (Rates), Rules, Regulations or Conditions herein contained, or applicable to this service application or contract, which may become effective upon the issuance hereafter of any new schedule or supplement under order or by permission of the Public Service Commission for the First District, then in that event this service application or contract shall be subject to all such changes or modifications after said new schedule or supplement has been issued, posted, and when effective.

"It is further understood and agreed that in the event of any change or modification in the company's schedule or supplement affecting the Service Charge (Rates), which would operate to increase the cost of the service to the consumer, the Company shall notify the consumer upon the issuance of said new schedule or supplement of such change or modification in said Service Charge (Rates) and the consumer thereafter may at his option cancel said application or contract for service upon giving the Company three (3) days' written notice any time prior to the effective date of the said new schedule or supplement."

The supplement did not, however, attempt to impose this order upon contracts made prior to April 14, 1917. Thereafter on May 1, 1917, the company issued the new schedule, effective June 1, 1917, the propriety of whose application to prior term contract consumers is now under consideration.

This schedule provided for the following classes of service:

Rate A or General Service — under which the consumer agreed to pay for a minimum of 10,000 kals.* during the term of agree-

* A "kal." is defined in the schedule as one pound of water evaporated into steam or one pound of steam condensed into water.

ment, the period of the contract to be filled in by the company depending upon conditions.

Rate B—Annual Power Service—under which the consumer agreed that the minimum monthly quantity to be paid for shall not be less than 250,000 kals. and that the period of which contract should be not less than one year. (The form of this contract is set out in an appended schedule.)

Rate C—Apartment House Service—under which the consumer agreed that the minimum monthly quantity to be paid for should not be less than 100,000 kals. when the period of service was twelve consecutive months, or 150,000 kals. where the period of service was eight consecutive months, the period of the contract to be filled in by the Company depending upon conditions.

Rate D—Summer Power Service—under which the consumer agreed that the minimum monthly quantity to be paid for should be not less than 100,000 kals., the period of the contract to be filled in by the company depending upon conditions.

Rate E—Auxiliary or Emergency Heating Service.

One of the terms and conditions which the schedule of June 1, 1917, provided should be incorporated in all service agreements was as follows:

“10. Service Charge (Rates), etc., Subject to Termination. Change or Modification.—The service charge (rates), terms and conditions, fixed herein, are subject to termination, change or modification through the issuance of any subsequent schedule or supplement in accordance with the Public Service Commissions Law, under order or by permission of the Public Service Commission for the First District.”

At the time the new schedule became effective, that is, June 1, 1917, the company had outstanding the following term contracts:

(a) Twenty-eight contracts which were entered into prior to November 1, 1916, some of which were made prior to the filing of the schedule on December 26, 1914, but most of which were made between that date and November 1, 1916.

(b) Thirty-five contracts made in accordance with the schedule effective November 1, 1916, between that date and April 14,

1917, none of which was for more than one year and many of which were for a less period. These contracts were either annual power or summer power contracts.

(c) Thirteen contracts made between April 14, 1917, and June 1, 1917, which were in accordance with the schedule effective November 1, 1916, to which was annexed the rider provided for in the supplement effective on April 14, 1917.

The general rate schedule of November 1, 1916, and the supplement of April 14, 1917, containing the rider as to the termination of contracts, were both filed and put into effect under "special permission" of the Commission upon less than thirty days' notice. The permission so granted by the Commission carried with it no implication of approval of the contents of the schedule or supplement. Section 80, subdivision 10, of the Public Service Commissions Law provides, in part, as follows: "Unless the commission otherwise orders, no change shall be made in any rate or charge, or in any form of contract or agreement or any rule or regulation relating to any rate, charge or service, or in any general privilege or facility, which shall have been filed or published by a steam corporation, person or municipality in compliance with an order of the commission, except after thirty days' notice to the commission and the publication for thirty days as required by order of the commission, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the change will go into effect. The commission for good cause shown may allow changes without requiring the thirty days' notice under such conditions as it may prescribe."

Under this provision, it is customary for the Commission to grant a "special permission" for putting into effect a rate schedule or supplement, without in any way passing upon the justness or reasonableness of the rates or rate regulations therein provided. The filing of a rate schedule with this Commission does not in any way imply an approval by the Commission of the rates named therein, and the fact that the schedule or supplement was permitted to be filed on less than the thirty days' statutory notice does not indicate that the Commission has passed any judgment upon

the reasonableness or lawfulness of the rates. The only effect of the granting of such permission was to lessen the time which would otherwise have to elapse before the schedule could have become effective.

Before considering the reasonableness of the schedule effective June 1, 1917, with respect to several classes of contracts, it will be necessary to consider the validity and enforceability of these contracts upon the dates prior to June 1, 1917, when they were severally made. If any such contracts were without validity and unenforceable when made, of course the new schedule cannot be said to have unlawfully effected a cancellation.

Subdivision 10 of section 80 of the Public Service Commissions Law vests in the Commission power to require every steam company to file with the Commission and keep open to public inspection schedules showing all rates and charges made, established or enforced or to be charged and enforced, *all forms of contract or agreement and all rules and regulations relating to rates or charges* used or to be used, and all general privileges and facilities granted or allowed by such steam corporation. The Commission acting under this provision made the filing order in Case No. 1890, on November 24, 1914, embodying the requirements set forth in the statute. The document purporting to set forth the rate schedule and the forms of contract thereunder was thereupon filed by the New York Steam Company on December 26, 1914.

The New York Steam Company having on December 26, 1914, filed what purported to be its rate schedule, it was thereafter prohibited by the following provision of section 80 of the Public Service Commissions Law from charging other or different rates than those set forth in the schedule: "No corporation or municipality shall charge, demand, collect or receive a greater or less or different compensation for any service rendered or to be rendered than the rates and charges applicable to such services as specified in its schedule filed and in effect at the time; nor shall any corporation, person or municipality refund or remit in any manner or by any device any portion of the rates or charges so specified, *nor to extend to any person or corporation any form of*

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contract or agreement, or any rule or regulation, or any privilege or facility, except such as are regularly and uniformly extended to all persons and corporations under like circumstances."

The contracts which were executed prior to the schedule effective November 1, 1916, and which are claimed by the consumer parties thereto to be in effect June 1, 1917, were, however, not made in accordance with any filed schedule which complied either with the statutory requirement or with the filing order of the Commission. They were not uniform in their provisions and the general privileges granted by some were not extended to all. These contracts were described by the company's vice-president and general manager to be "the odds and ends of contracts which were made on various terms and conditions suitable in the judgment of the company to the premises that they served; they were trial contracts."

He also testified as follows: "Q. Do I understand that contracts made prior to November 1st, 1916, do not pretend to follow the forms which were filed in December, 1914? A. No; they follow the forms, but they do not follow the rate, because there was only a general rate filed, and there was no power rate filed at that time, and until November 1st, 1916. Q. That is, you made those contracts as it was necessary to meet the requirements of each particular consumer? A. Yes, and just continued those which were made until we did get the new schedule on file, those which were already in force."

Not having been made in conformity with the law and the order of the Commission, they are invalid and unenforceable. To hold that such contracts are enforceable would disregard the express provisions of the statute and violate the principles upon which these provisions are founded. When these contracts were made, consumers were bound to ascertain whether they conformed in rate and general provisions to schedules on file. If they neglected to do so they cannot now complain. I am of the opinion that the company rightfully cancelled all contracts made prior to November 1, 1916, irrespective of the reason which may have been assigned for such cancellation.

A very different question, however, is presented with respect to the contracts made between November 1, 1916, and April 14, 1917. All of those contracts were in the form set out in the rate schedules which went into effect November 1, 1916, and they provided for service at the scheduled rates. Similar contracts could be had by all the public who demanded like service. If, then, these contracts were not unduly discriminatory or preferential when made, they are enforceable unless abrogated by the filing of the schedule of June 1, 1917. Nothing has been made to appear justifying at present a decision that such contracts were unduly discriminatory when made. The general principle is elementary that those engaged in serving the public must not unreasonably and unjustly discriminate between their patrons, but must charge a reasonable and uniform price to all persons for the same service rendered under like circumstances. While the value of the service to patrons of the same class must be measured by the same rate, yet all discrimination is not forbidden; only unjust discrimination is banned. A reasonable classification is permissible. The general rule is that where the conditions and circumstances under which the service is rendered are essentially different varying rates are justified. *New York Telephone Company v. Siegel-Cooper Company*, 202 N. Y. 502, 509; *Western Union Telegraph Company v. Call Publishing Company*, 181 U. S. 92; *Knott v. South-western Telegraph & Telephone Company* (Missouri Commission), P. U. R. 1915 E. 963. These principles are embodied in the Public Service Commissions Law of New York, which, in section 79, provides as follows:

“§ 79. Adequate Service; Just and Reasonable Charges; Unjust Discrimination and Unreasonable Preference. 1. Every steam corporation shall furnish and provide such service, instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable. All charges made or demanded by any such corporation for such service rendered or to be rendered shall be just and reasonable and not more than allowed by order of the commission having jurisdiction. Every unjust or unreasonable charge made or demanded for such service, or in con-

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nection therewith or in excess of that allowed by law or by the commission is prohibited.

"2. No such corporation shall directly or indirectly by any special rate, rebate, drawback or other device or method, charge, demand, collect, or receive from any person or corporation a greater or less compensation for such service rendered or to be rendered or in connection therewith, except as authorized in this chapter, than it charges, demands, collects or receives from any other person or corporation for doing a like and contemporaneous service with respect thereto under the same or substantially similar circumstances or conditions.

"3. No such corporation shall make or grant any undue or unreasonable preference or advantage to any person, corporation or locality, or to any particular description of service in any respect whatsoever, or subject any particular person, corporation or locality or any particular description of service to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

It is conceded by the company that the service rendered to annual power and summer power consumers, who agreed to pay a monthly minimum for a definite period, is not the same as that rendered to consumers who did not contract liability for minimum consumption, but who paid solely for the steam which they might consume. The services are given under essentially different conditions and circumstances. The general rates of the company apply to consumers who use steam for heating purposes and to all other consumers who did not agree to take service for a definite period and to pay a minimum monthly charge irrespective of the amount used. Those who pay the general rates are usually peak load users who may take and discontinue service at their own pleasure, the provision for whose service demand must be made available at all times and creates an unfavorable load factor. These differences in conditions and circumstances are pointed out in *Graver v. Brooklyn Edison Company*, 126 App. Div. 371, 376, 377, where, in speaking of electric rates and services, the court says: "The mere fact that one man gets an equal amount

of current for less money than his neighbor is not conclusive; it must be shown that it was under the same circumstances and conditions, and this is not shown unless it is established that the current was furnished during substantially the same hours and in substantially the same amount; it should appear at least that the bills with which comparison is made were contracted for substantially the same number of lights, of equal capacity, and during substantially the same hours, and the evidence in this case does not show this; does not pretend to show it. * * *

"To say that the plaintiff was receiving his current under the same circumstances and conditions as those who had agreed to take a certain amount, or to pay a certain amount whether they used it or not, is a mere arbitrary assertion, not warranted by the facts. In view of the peculiar nature of electricity, of the conceded difference in cost under different conditions, and the importance of knowing the amount of current and the times in which it is to be demanded, we think it is a very material condition surrounding the transaction that the contract in one case provides for the use of a given quantity, while in the other the party is free to use much or little as it pleases him. While he, in effect, demands that the corporation shall be prepared to furnish current for his entire equipment, he does not guarantee to the defendant that he will use enough to make it profitable for it at any price, and it is only fair that, within reasonable limits, the corporation should be permitted to exact a rate which will compensate it for its larger investment and for the risk it runs of not having a market for the product which it must be prepared to deliver."

In *Peck v. Indianapolis Light & Heating Co.*, P. U. R. 1916-B, 445, 487, the Indiana Commission said: "In order to maintain this utility in the most economical way it is necessary to give consideration to large users of light and power. The ability of such users to install private plants for the production of electricity for their own use creates a competitive condition that must be reckoned with. The investment in the two plants now operating in Indianapolis is but little above the expenditures that would

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be necessary if these were removed and one ideal plant established. The necessities of the community require the continuous operation of these two. If the large business houses and factories of the city were to abandon the existing plants and install private ones, the cost to private consumers would be greatly increased. Yet, these private consumers are wholly unable to install separate plants. Such relief is economically imprudent and unwise. A small margin of profit on each kilowatt of consumption adds much to the revenues of the company. As the plant must be in continuous operation, the testimony shows that the general experience of all operators has been that it is better for small consumers to serve large users at a low rate than not to serve them at all."

The undertakings of the parties to a contract for a definite period of service are mutual and reciprocal; the company is assured that for a stated period it will receive a monthly minimum return irrespective of the actual consumption, and the consumer is assured that for that period he will receive service at the stipulated rate. The period during which the contract is to be in effect must, therefore, be deemed an essential element of the rate in this class of service. Hence, I am of the opinion that the annual power contracts and the summer power contracts were valid and not unduly discriminatory when entered into.

The question next to be determined is the validity and reasonableness of the new schedule in its application to those outstanding contracts which were valid and enforceable when made. The principal contention advanced in support of the *right* to abrogate the contracts by the filing of a new schedule is that, if they are held to be enforceable, consumers now receiving service under the same conditions and circumstances will pay a different rate and that, therefore, undue discrimination between those consumers will result. But, under the forms of contract provided for in the schedule of June 1, 1917, there is no class of consumers who may receive service under the conditions and circumstances prevailing as a result of the outstanding contracts. There is no consumer who is assured of service for a definite term. The condition appearing in the new schedule, which became a part

of every contract, that all terms and conditions are subject to termination or modification through the issuance of any subsequent schedule by the company, had the evident purpose of reserving to the company the right to abrogate the contracts at any time by the mere filing of a new schedule. The so-called contracts in the new schedule, in my opinion, have not the essential elements of legal contracts. The company does not thereby bind itself to give service for any definite period — one year or one day — but reserves the right to cancel the contract forthwith by the mere filing of a new schedule. There is an absolute lack of mutuality of obligation, and consequently no enforceable agreement or contract is created.

It follows that a consumer who agreed to take service for a definite term at a minimum monthly charge at the rates and upon the conditions, in accordance with the schedule effective November 1, 1916, is in a different class and takes service under essentially different circumstances than the consumer who may take service under the terms and conditions of a so-called contract terminable by the company at will, assuming, of course, that the prior contracts are not impliedly subject to abrogation in the exercise of the right asserted by the company to file new schedules of new rates and conditions.

But I am of opinion that the contracts made pursuant to the schedule of November 1, 1916, are valid for the stipulated term, and are not lawfully terminable by the voluntary act of the company in putting into effect a new schedule pursuant to statutory provisions or by the consumer. Quite irrespective of the difference in the forms of contract in the particular schedules under consideration, it is my view that nondiscriminatory contracts made pursuant to the filed schedule, whose period has a definite, necessary and reasonable relation to the nature of the service covered thereby and the rate fixed thereunder, constitute a distinct class of patrons and provide for a distinct condition of service separate and apart from that class of patrons and conditions of service provided for under the subsequent schedule. Such classification is reasonable and is a necessary incident to

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the practice of making term contracts at all. If there is to be a continued recognition of the benefits accruing to both large and small consumers from term contracts providing for a minimum monthly payment, then such nondiscriminatory contracts, made in accordance with file schedules, must be held obligatory during their life, and their cancellation at the will of the company for the purpose solely of obtaining additional revenue is unjust to those consumers who, in reliance upon the terms of such contracts, have adjusted their situation in view of those terms. If this is not accomplished, the contract customer is assured of no different class of service than the customer paying the maximum rate and taking service at will.

Subdivision 10 of section 80 of the Public Service Commissions Law, in providing for the filing with the Commission of all forms of contracts or agreements relating to rates or charges, must have contemplated that such contracts can be lawfully made as will define the mutual rights of the utility and the consumer under the rates thereby fixed.

I am of opinion that as the schedule of June 1, 1917, does not distinguish between the classes of patrons and conditions of service adverted to, the rates specified in that new schedule apply to all consumers who have made contracts pursuant to the schedule of November 1, 1916, until the company voluntarily or under order of the Commission fixes a different rate. As the Commission has no power to award reparation, the consumer's relief because of the excessive and unlawful charge for the intermediate period must be obtained in any other forum which may take cognizance of such causes of action.

The anomalous situation which is here presented could be avoided were the Commission given the same power to suspend schedules of steam companies as it possesses with respect to tariffs of common carriers (Public Service Commissions Law, § 29) and were given the same power to award reparation as is possessed by the Interstate Commerce Commission, or if no increased rate could be filed except after approval thereof had been received from the Commission as is now provided respecting

tariff of interstate carriers by the acts of Congress of August 9, 1917.

The authorities cited by the counsel for the steam company and for the New York Edison Company as *amicus curiæ* have been examined with care, but none is found to be in conflict with views which have been here expressed. In Matter of Electric Rate Contracts of New York Edison Company, 6 P. S. C. R., 1st Dist., N. Y., 48, 289, 328, this Commission condemned as unduly discriminatory contracts between an electrical company and several of its customers under which the company agreed to furnish and maintain more than one meter on the premises of each customer. The contracts had several years to run when the Commission entered an order that after January 1, 1916, the amount of the current supplied should be determined by a master meter and that there should be but one meter to a service. The Commission, adopting a memorandum of its counsel, held that the schedule filed pursuant to the order referred to abrogated the outstanding contracts which had been held to be discriminatory. No consideration was there had of the question as to the effect of a voluntary increase in rates and a voluntary change in terms upon nondiscriminatory contracts made in accordance with existing schedules, nor was there consideration had of the power of the Commission to order an amendment of schedules to provide for such outstanding contracts. In that case the practice of furnishing to landlord consumers submeters used by the landlord in measuring the tenants' current consumption was condemned and prohibited and contracts for the supply of tenants' submeters were, in effect, held to be discriminatory and invalid.

Certain statements in the case of Armour Packing Company v. United States, 209 U. S. 56, chiefly relied on by the company, when read apart from the context and without a consideration of the particular facts, lend superficial support to the contentions of the company. In the limited application of those statements to the issue there involved, there is not deducible any principle at variance with the conclusions reached in this opinion. In the Armour case, it appears that on June 17, 1905, the Chicago,

Burlington-Quincy Railway Company contracted with the packing company to carry export shipments from Kansas City, Kan., until December 31, 1905, at a rate the proportionate part of which from the Mississippi river to New York city was twenty-three cents per 100 pounds. The rate was that set forth in the railroad's filed tariff schedule. No period of time, however, was coupled with the filed rate. On August 6, 1905, the tariff was amended and duly published and filed showing that the proportionate part from the Mississippi river to New York city was thirty-five cents instead of twenty-three cents per 100 pounds. On August 17, 1905, the packing company delivered to the railroad company certain products for shipment and the railroad company accepted them and received pay on the basis of the contract made June 17, 1905. Thereupon Armour company was prosecuted and convicted for a violation of the so-called Elkins Act in obtaining an unlawful concession from the published and filed rate. It must be noticed that there was no schedule on file at the time the contract was entered into, providing for the making of such contracts. Time is not an essential element of the rate of carriers as it may be in certain classes of service of public utilities. The nature of the services is essentially different. Furthermore, the rate given by the Burlington company to Armour was not open to the public at large. It was a secret and private arrangement—discriminatory and preferential when made. As the court said: "In the Elkins Act, Congress has made it a penal offense to give or receive transportation at less than the published rate. This rate can only be raised by ten days' or lowered by three days' notice. Sec. 6, 25 Stat. 855. There is no provision excepting special contracts from the operation of the law. One rate is to be charged and that the one fixed and published in the manner pointed out in the statute, and subject to change in the only way open by the statute. *There is no provision for the filing of contracts with shippers and no method of making them public defined in the statute.* If the rates are subject to secret alteration by special agreement then the statute will fail of its purpose to establish a rate duly pub-

lished, known to all, and from which neither shipper nor carrier may depart.

"It is said that if the carrier saw fit to change the published rate by contract the effect will be to make the rate available to all other shippers. But the law is not limited to giving equal rates by indirect and uncertain methods. It has provided for the establishing of one rate, to be filed as provided, subject to change as provided, and that rate to be while in force the only legal rate. Any other construction of the statute opens the door to the possibility of the very abuses of unequal rates which it was the design of the statute to prohibit and punish." And in quoting with approval from *New York, New Haven & Hartford R. R. Company v. Interstate Commerce Commission*, 200 U. S. 361, 391, the court said: "It cannot be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and to destroy favoritism, these last being accomplished by requiring the publication of tariffs and by *prohibiting secret departures from such tariffs*, and forbidding rebates, preferences, and all other forms of undue discrimination. To this extent and for these purposes the statute was remedial and is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve. * * * The all-embracing prohibition against either directly or indirectly charging less than the published rates shows that the purpose of the statute was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be brought about. If the public purpose which the statute was intended to accomplish be borne in mind, its meaning becomes, if possible, clearer."

The evil resulting from holding the contract valid was thus stated by the Circuit Court of Appeals (153 Fed. Repr. 1): "If a carrier may lawfully make an enforceable contract with a shipper to maintain an established rate upon future shipments for a definite time, it may make such an agreement with a pre-

ferred patron, then file and publish an advanced rate, which will govern like transportation by others similarly situated, and the performance of its contract will give the concession and work the discrimination which the national acts to regulate commerce were enacted to prevent. All carriers may make similar agreements with their shippers and take like proceedings, and the national legislation against rebates, concessions, and discrimination will be futile. The acts of Congress may not be thus evaded."

But in the present case no such agreement with a preferred patron is possible because every patron was entitled to make a contract in the form set forth in the filed schedule of November 1, 1916. Public Service Commissions Law (§ 80, subd. 10) expressly provides for the filing of schedules showing forms of contract relating to rates. The holding in the *Armour* case was that upon the filing of the new increased rate that rate was the only rate chargeable and that the payment of a less rate was in violation of law. The power of the Interstate Commerce Commission to compel an amendment of schedules was not involved. The schedule rate was the only one that could be lawfully charged and the fact that a secret discriminatory contract had been made which was not provided for in any filed tariff did not justify the granting of a rate different from that in the new schedule. Guaranteed patronage for a definite period has not in respect to transportation been held to be a justifiable ground for distinction in rates of common carriers to shippers, as it has been in rates of other utilities to their consumers. *Moritz v. Ed. El. Illuminating Co. of Brooklyn*, 7 P. S. C. R., 1st Dist., N. Y. 175; *Maires v. Flatbush Gas Co.*, 15 St. Dept. Rep. —.

In several of the other cases relied upon, contracts—some discriminatory and some not discriminatory when made—became so upon the adoption of a Public Service Commissions Law and the filing of schedules thereunder, and it was properly held that the sovereign State had the power to terminate these contracts by the passage of the law. That situation is different from the

one arising where it is sought to keep in force nondiscriminatory contracts made in accordance with filed schedules.

A situation illustratively analogous to the one here presented arises in cases where railroad companies increase mileage rates and commutation or trip ticket rates by the filing of new tariffs. In such cases, it has been the invariable practice to permit the use of books and tickets of the classes indicated which were outstanding at the time of the increase in accordance with their terms and until their expiration. The fact that this practice has been universal and that there have been no complaints or prosecutions on the basis that it was in violation of the law is persuasive that the prevalent view is that such contracts are in a separate class and are not affected by new tariffs. While most statutes specifically permit the issuance of these classes of transportation, such statutes are but a recognition of the common law rule that rates and contracts are not discriminatory which are based upon essentially different service and under essentially different conditions. *Interstate Commerce Commission v. B. & O. R. R.*, 145 U. S. 263, 278.

It is, of course, entirely sound, as urged, that the Commission has no power to direct specific performance of a contract between the company and a consumer. Here, however, the attack in reality is made upon the schedule of June 1, 1917, which unreasonably and unlawfully fails to provide for the continuance of the contracts, and it is well settled that application must be made to the Commission to obtain a modification or reformation of schedules where the complaint is made against the schedule itself rather than upon the manner of its application. *Metzger v. N. Y. State Rys.*, 168 App. Div. 187.

My conclusions, therefore, may be summarized as follows:

1. That the act of the New York Steam Company in canceling by its notice of May 28, 1917, contracts made in conformity with the schedule effective November 1, 1916, was unjust and unreasonable.
2. That the schedule of June 1, 1917, is unjust, unreasonable, and unlawful in so far as it does not provide a separate classifica-

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tion for contracts in force on that date and made in conformity with the schedule effective November 1, 1916.

3. That the company should be directed to file a supplement to this schedule of June 1, 1917, which shall provide that all contracts made in conformity with the schedule effective November 1, 1916, and outstanding on June 1, 1917, unless thereafter canceled by mutual consent, shall be in full force and effect.

APPENDIX A

Form of Annual Power Contract—November 1, 1916, Schedule Agreement for Steam Service

TO THE NEW YORK STEAM COMPANY

General Offices: 280 Madison Avenue at 40th Street
New York City

NEW YORK,, 191..

The undersigned requests The New York Steam Company to supply Steam to the premises
For the beginning
and terminating
and subject to the Rules and Regulations endorsed hereon, and made a part hereof, agrees:

To pay for such service monthly, or at such other times as the meter may be read, upon presentation of the bill; that the supply shall be measured by the meter provided by the Company; that the rate shall be:

ANNUAL POWER RATE

For the first 500,000 pounds consumed in each monthly period, \$.50 per 1000 pounds.

For the next 500,000 pounds consumed in each monthly period, \$.45 per 1000 pounds.

For all over 1,000,000 pounds consumed in each monthly period, \$.40 per 1000 pounds.

It is further agreed, in consideration of the rates herein specified, that the minimum monthly quantity to be paid for by the undersigned shall not be less than 250,000 pounds.

The Steam Service is to be used for the following purposes:

For The New York Steam Com-

pany

Submitted

Approved

Vice-President.

Please sign full name.

Accepted

Secretary-Treasurer.

If corporation or co-partnership, name and title of member signing.

Deposit

Mailing Address if other than above.

Remarks

NOTE.—This form of application used for Annual Power Consumers. The "Rules and Regulations" are made a part of this contract.

APPENDIX B

Form of Annual Power Contract—June 1, 1917 Schedule Agreement for Steam Service

TO THE NEW YORK STEAM COMPANY

General Offices: 280 Madison Avenue at 40th Street
New York City

NEW YORK,, 191..

The undersigned requests The New York Steam Company to supply Steam to the premises. and subject to the Terms and Conditions endorsed hereon, and made a part hereof, agrees:

To pay for such service monthly, or at such other times as the meter may be read, upon presentation of the bill; that the supply shall be measured by the meter provided by the Company; that the rate shall be:

RATE "B"—ANNUAL POWER SERVICE

For the first 500,000 kals consumed in each monthly period at \$.60 per 1000 kals.

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For the next 500,000 kals consumed in each monthly period at \$.54 per 1000 kals.

For the next 1,000,000 kals consumed in each monthly period at \$.48 per 1000 kals.

For the Excess over 2,000,000 kals consumed in each monthly period at \$.45 per 1000 kals.

It is agreed, in consideration of the Company's "Annual Power Service" Rate "B" that the minimum monthly quantity of steam to be paid for by the undersigned shall not be less than 250,000 kals during the term of this agreement and any extension thereof, and that its period shall continue for not less than one year from the beginning of the service supplied hereunder, subject thereafter to termination by either party upon giving thirty days' notice in writing.

Rate "B" applies to "Annual Power Service" (Steam for Power and Heating purposes for 12 consecutive months).

The Steam Service supplied under this schedule is to be used for the following purposes:

For The New York Steam Com-

pany

Submitted

Approved

Vice-President.

Please sign full name.

Accepted

Secretary-Treasurer.

If corporation or co-partnership, name and title of member signing.

Deposit

Mailing Address if other than above.

Remarks

Upon the foregoing opinion the Commission, on the 25th day of February, 1918, made the following order:

By THE COMMISSION.—Hearings having been duly had by and before the Commission in the above-entitled matter, H. H. Whit-

man, Esq., appearing for the New York Steam Company, H. J. Hemmens, Esq., appearing for the New York Edison Company, *amicus curiæ*, and Godfrey Goldmark and Robert J. Farrington, Esqs., assistant counsel, attending for the Commission; and the Commission being of the opinion and having determined after the proceedings had upon said hearings that the act of the New York Steam Company in canceling by its notice of May 28, 1917, contracts made with it in conformity with its schedule effective November 1, 1916, was unjust and unreasonable and that the schedule of said company effective June 1, 1917, is unjust, unreasonable and unlawful in so far as it does not provide a separate classification for contracts in force on that date and made in conformity with the said schedule effective November 1, 1916; now, therefore, it is

Ordered, That on or before March 5, 1918, said New York Steam Company shall issue, file and post a supplement to its schedule of June 1, 1917, which supplement shall provide that all contracts made in conformity with the schedule of said company effective November 1, 1916, and outstanding on June 1, 1917, unless thereafter canceled by mutual consent, shall be in full force and effect.

Further ordered, That this order shall take effect immediately and shall continue in force until changed or abrogated by further order of the Commission. This order, however, is made without prejudice to further hearings and proceedings in the above-entitled matter with respect to the reasonableness generally of the basic rates and charges set forth in the said schedule of June 1, 1917, and supplements thereto, and no determination thereon is hereby made.

Further ordered, That on or before March 2, 1918, the New York Steam Company shall notify the Commission in writing whether the terms of this order are accepted and will be obeyed.

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In the Matter of the Hearing on the Motion of the Commission Concerning the Regulations, Practices and Service of THE BROOKLYN HEIGHTS RAILROAD COMPANY; BROOKLYN, QUEENS COUNTY AND SUBURBAN RAILROAD COMPANY; CONEY ISLAND AND GRAVESEND RAILWAY COMPANY; THE CONEY ISLAND AND BROOKLYN RAILROAD COMPANY, and THE NASSAU ELECTRIC RAILROAD COMPANY on Their Respective Lines of Street Surface Railroad

Case No. 1880

(Public Service Commission, First District, March 4, 1918)

Schedules ordered to be filed with the Commission as to operation and routes of certain street railroad companies.

The Commission, after an investigation which began on October 26, 1914, and was continued on various dates thereafter, finds that the Brooklyn Heights Railroad Company and other street railroad companies fail to run their cars with sufficient regularity or frequency, and do not have or maintain reasonable schedules for the runs upon several of their lines, and that their time schedules and the service regulations and practices of the said street railroad companies as to the frequency of the running of cars, the extent of overloading, the adjusting of passengers, are inadequate, insufficient and improper, and that the said companies should establish, file and maintain definite schedules representing standards of adequate service on each of the said lines.

By THE COMMISSION.—A hearing having been duly held in the above-entitled matter on October 26, 1914, and on various adjourned dates thereafter, and the Commission being of opinion that the Brooklyn Heights Railroad Company; Brooklyn, Queens County and Suburban Railroad Company; Coney Island and Gravesend Railway Company; the Coney Island and Brooklyn Railroad Company, and the Nassau Electric Railroad Company do not, nor do any of them, run their cars with sufficient regularity or frequency, and do not have or maintain reasonable time schedules for the runs upon various of their lines, and that such time schedules as the companies do have are not based upon proper

standards for the maintenance of adequate and sufficient service on the said lines, and that the service, regulations, and practices of each of the said street railroad companies, in respect to the frequency of the running of cars, the extent of overloading and congestion of passengers, the failure to provide seats for passengers, and the time schedules for the various runs, are inadequate, insufficient and improper, and the Commission being of the further opinion that the companies, and each of them, should establish, file, observe and maintain definite schedules representing standards of adequate service on each of the said lines;

Now, therefore, it is hereby

Ordered, That the Brooklyn Heights Railroad Company, Brooklyn, Queens County and Suburban Railroad Company, Coney Island and Gravesend Railway Company, the Coney Island and Brooklyn Railroad Company, and the Nassau Electric Railroad Company, and each of them, be and they are hereby directed to do each and all of the following things, to wit:

(1) Prepare and file with this Commission, within ten days from the date of this order, and three days before their effective date, a schedule or schedules showing, as to each line operated or controlled by each such company, the service which such company has established and is providing, and is willing to and will continue to provide, and the number and headway of cars which such company is operating and is willing to and will continue to operate, as representing and constituting standards of adequate service for the transportation of passengers, on such line, until such time or times as such schedule or schedules shall be changed in the manner hereinafter provided, each of which such schedules shall be signed and attested by the proper officers and agents of the company for which such schedule is submitted, and shall show, as to and for each line:

(a) The route over which the operation of such line is to take place;

(b) The car run numbers assigned to such line;

(c) The terminals and car depots for such line;

(d) The termini of each run of cars on any part of such line;

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(e) The location or specific points, not less than five in number, on such line, past which the car of each run shall be scheduled to be operated at designated times of the day and night; such points, the runs, and the scheduled time at which each car on such run shall pass each such designated point, to be shown in and by the said schedules;

(f) Specific times of the day and night when the cars of each run shall be scheduled, respectively, to depart from such termini and to pass the designated points; and

(g) The run numbers of cars so scheduled to depart from such termini and pass such specified points at such specified times of the day and night;

(h) The names and official titles or positions of the officers and agents of each company who are, and are designated by the company as, responsible for the company's observance of and compliance with any of the provisions of this order.

Provided, however, that at any time after the filing of any such schedule or schedules, any of the said companies may make changes in or additions to any schedule filed by it, upon filing with the Commission a supplemental schedule or statement setting forth fully the changes or additions to be made in the schedule last theretofore filed, in accordance with paragraph (4) hereof and not inconsistent with any order of this Commission.

(2) Operate cars and maintain service on each of the said lines according to and in compliance with the schedules therefor and supplements thereto at the time on file with the Commission and all orders of this Commission affecting such service, and to continue to operate cars and maintain service according to and in compliance with such schedules or supplements and order or orders, until such schedule or supplement or the requirements thereof have been modified or changed by order of the Commission after hearing or by the company through the filing of a new schedule in accordance with paragraph (4) hereof.

Provided, further, that if on any day on any line, the officers and agents of the company operating the said line fail to operate cars and provide service, according to and in compliance with

the requirements of this order, in that during more than one hour on such day the number of cars required for such line by the schedule at the time in force are not operated on such line, or in that during more than two consecutive hours four or more cars leave the indicated termini on scheduled car-runs on an average of more than ten minutes later than the scheduled times of the cars on such run numbers, it shall be the duty of the said officers and agents whose names are filed by the company pursuant to subdivision (h) of paragraph (1) hereof to report the facts of such non-compliance to the Commission in writing within twenty-four hours from the time thereof.

(3) Display in a conspicuous position on the front and outside of each car operated for the transportation of passengers on each such line a suitable plate or sign to denote the run number on the schedule under which said car is being operated; and also display, in a conspicuous place on the inside of such car, a suitable time-table showing the headway and service which the said company is required to maintain and operate upon such line, during the respective hours of the day and night, under the schedules or supplements at the time in force as to such line or lines; the form, design, style and size of such plate or sign, and of such time-table, to be prepared by the company and submitted for the approval of the Commission within fifteen days from the date hereof, and such plates or signs and such time-table so approved to be provided, installed and displayed within thirty days from the approval of the form, design, style and size thereof by the Commission, and to be thereafter at all times correctly kept and displayed in each such car by the company.

(4) At any time after the filing of the original schedules, any company may file with this Commission, at least five days in advance of their effective dates, unless the Commission shall by order or special permission approve a lesser time, amended or substituted schedules or supplements thereto, showing changes which the company desires to make with respect to any of the matters in the filed schedules specified in paragraph (1) hereof, and which are not inconsistent with any order of the Commission.

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and, unless otherwise ordered by the Commission after hearing, such amended or substituted schedules shall go into and be and continue in effect until further changed as provided in this paragraph or by order of the Commission after hearing. Provided, however, that nothing contained in this order or done by any company in pursuance thereof shall be or be construed to be in derogation of or in substitution for the duty of such company to provide reasonable and adequate service and operate a sufficient number of cars therefor at all times on each of its lines, by running cars or affording service, as needed, in excess of the requirements of the said schedule and supplements at the time in force as to such line or lines, or otherwise; and nothing contained in this order or done by any company in pursuance thereof shall be construed to prevent any of the said companies from operating at any time on any lines any cars or service in addition to those set forth in the said schedules and supplements at the time in force as to such line or lines.

Further ordered, That the making and entry of this order, and anything done hereunder, shall be without prejudice to any other or further order in this case or in respect to the subject-matter hereof or of the said schedules, and shall be subject to any further hearing for the purpose of requiring changes or additions in the said schedules of service and operation or any of them; and it is

Further ordered, That this order (excepting paragraph (3) hereof) shall take effect immediately and shall continue in effect for a period of eighteen months from the date of this order, unless sooner changed or modified by an order made by this Commission; that the provisions of paragraph (3) hereof shall take effect at the times therein specified and continue in effect during the time that the other portions of this order are in effect; and that, within five days after the service of this order on each of the companies named above, the said companies and each of them shall notify the Commission in writing whether the terms of this order are accepted and will be obeyed.

Further ordered, That, upon the filing with this Commission by the said companies and each of them of a notification in writ-

ing that the terms of this order are accepted and will be obeyed, the following orders heretofore made by this Commission shall be, and be deemed to be, abrogated, on and after the date of filing of such notice:

Final order in Case No. 1433, made and entered January 20, 1912, relative to service on the Flatbush Avenue line, operated by the Brooklyn Heights Railroad Company.

Order modifying final order in Case No. 1686, made and entered March 30, 1917, relative to service on the Ralph-Rockaway line, operated by the Nassau Electric Railroad Company.

Final order in Case No. 1744, made and entered April 24, 1914, relative to service on the Vanderbilt and Sixteenth Avenue lines, operated by the Nassau Electric Railroad Company and the Brooklyn Heights Railroad Company.

In the Matter of the Hearing on Complaint of CHARLES A. GOULD against THE NEW YORK EDISON COMPANY with Respect to Its Alleged Refusal to Rerender Bills for Electric Current Supplied to Premises at No. 126 Fifth Avenue, Borough of Manhattan, City of New York, for the Period from March 5 to May 7, 1916, on the Basis of a Combination Contract Price Instead of Individual Contract Prices

Case No. 2257

(Public Service Commission, First District, March 13, 1918)

Jurisdiction of a Public Service Commission in the matter of charges for current consumed between the time of applying for installation of a master meter and the actual installation of such meter.

Premises 126 Fifth avenue, in the borough of Manhattan, city of New York, are owned by the complainant. The building consists of twelve stories, the first four floors being used for offices and the upper floors for lofts. When the application for the installation of the master meter was made there were in existence direct contracts between the tenants occupying the several lofts and the New York Edison Company, and five

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separate contracts between the complainant and the company, four covering the service on the four office floors and one the service for the public hall and elevators. Under each of these separate contracts a meter was installed. The authorized agent of the complainant on March 20, 1917, sent to the company consents to the cancellation of individual contracts from nine of the tenants, and two days later the company wrote to the complainant's agent giving a list of the tenants who had requested the company to cancel their contracts and render the bill to him, and stating that as this was in accordance with the landlord's contract with the company this would be done.

On May 7, 1917, the master meter was installed and about a month later the company rendered the said agent a bill charging the landlord the maximum rate for the consumption indicated upon each of the meters of the cancelling tenants and also upon the other contracts. The object of this proceeding is to secure a readjustment of the excess paid over the wholesale rate for the aggregate of current consumed by the tenants' meters, and for which complainant has been compelled to pay the maximum retail rate. *Held*, that the company in the first instance can determine what it believes to be a reasonable time between the application for the installation of a master meter and the actual installation, and if the Commission deem the company's determination unreasonable it can so find upon a proper hearing. While the Commission cannot order reparation for lack of jurisdiction it suggests that the bills be rendered so as to charge complainant the wholesale rate on all current consumed between April fifth and May seventh. Recommendation made in accordance with the opinion.

HERVEY, Commissioner.—The principal question involved in this proceeding is as to the rate to be charged for current consumed between the date of a landlord's application for the installation of a master meter accompanied by releases of tenants and the actual installation of such master meter.

The complainant is the owner of the premises 126 Fifth avenue, in the borough of Manhattan. The building consists of twelve stories, of which four floors are let for offices and the remainder for lofts.

At the time the application for the master meter was made the tenants occupying the lofts had direct contracts with the New York Edison Company and there were in force five separate contracts between the complainant and the company, four covering the service on the four office floors and one the service for public hall and elevators. A separate meter was installed under each

contract. On March 20, 1917, the authorized agent of the complainant sent to the Edison company consents to the cancellation of individual contracts from nine of the tenants and on March 22, 1917, the company wrote to the complainant's agent as follows:

"Below is given a list of your tenants who have requested us to cancel their contracts and bill their service to you.

"As your contract provides for including tenants' accounts, this will be done in the future unless we receive other instructions."

The master meter was not installed until May 7, 1917. It appears that it was the Edison company's custom to read the meters on complainant's premises on or about the fifth of each month. Early in April the complainant's agent received a bill from the company which charged the complainant the maximum rate for the consumption indicated upon each of the meters of those tenants who had canceled their contracts and also for the meters installed under complainant's several contracts with the company. These bills covered the period of March 5 to April 5, 1917. These bills were returned to the company with a request for rerendering so that the tenants' consumption should be included in determining the rate applicable. On April twenty-sixth the company replied, "We wish to advise you that we have requested a rerendering to include the tenants' with the owner's account for period March 5 to April 5, 1917." The company, however, subsequently refused to readjust the bills and the full amount had been paid by the complainant under protest.

After the installation of the master meter on May 7, 1917, bills were rendered in accordance with its readings.

This proceeding is brought to obtain a refund of the excess paid over the wholesale rate for the aggregate of current consumed by the tenants' meters and for which complainant has been obliged to pay the maximum retail rate. The company states that on receipt of the tenants' releases, the tenants' accounts were canceled and the consumption for the current month was charged to the landlord. Upon this ground it was explained that the complainant was charged with the consumption of the tenants, not only from the date of the application, March 20, 1917, but

from the date when the meter was last read, namely, March 5, 1917. The company maintains that the master meter was installed with all reasonable diligence and that it is justified in charging the maximum rate upon the consumption of each meter until the master meter was actually installed. The evidence, however, does not satisfactorily explain the cause of the long delay in the installation of the master meter. It appears that although the survey of the building for the purpose of ascertaining what the installation was took but several days, the master meter was not ordered by the company until April twenty-third, a month after the survey could be completed and over a month after the application was filed. Thereafter the necessary meter board was erected and the meter was ready for use on May seventh. In my opinion there was undue delay in the installation of the master meter. The company concedes that in some instances it has adjusted bills as here requested, but contends that this has been done only where the company found that it had not acted in accordance with the directions of the owner, or where delay was caused by the inattention of one of its own employees. The practice of the company deciding in each case whether the bills should be adjusted upon the company's own determination of whether there has been neglect or delay is one that may easily lead to discrimination and injustice, and cannot be sanctioned. I think the company should adopt a general regulation that where an application for a master meter is made, accompanied by the necessary consents of tenants, the landlord should be charged at the wholesale rate applicable for all current consumed from and after a specified number of days from the filing of the application. The company, in the first instance, can determine what it believes to be a reasonable time, and, if the Commission deems the rule unreasonable, it can so determine upon a proper hearing. The regulation should provide that the landlord will be charged for the consumption through tenants' meters at the rate applicable to each meter from the date of the application for the master meter to the date upon which, under the schedule to be filed, the master meter should be installed.

While the Commission cannot order reparation for lack of jurisdiction, it suggests that the bills be rerendered so as to charge complainant the wholesale rate on all current consumed between April fifth and May seventh. The company, in cases where it deemed itself at fault, has voluntarily refigured bills, and in view of the opinion already expressed as to the undue delay in the present case and in view of the impossibility of now determining actual consumption through the several meters as of any other date, I believe that the adjustment suggested would be entirely equitable.

I recommend that the secretary be instructed to transmit a copy of this opinion to the New York Edison Company and to inform it that unless an amendment to its schedules be filed within thirty days, so as to prescribe a regulation as here found to be necessary, the Commission will enter the necessary order to that effect.

PUBLIC SERVICE COMMISSION

SECOND DISTRICT

In the Matter of the Operation by the ELMIRA WATER, LIGHT AND RAILROAD COMPANY of Street Cars over the Main Street Highway Bridge over the Chemung River at Elmira, N. Y.

Case No. 6314

(Public Service Commission, Second District, January 17, 1918)

Diversion of volume of traffic to avoid cost of strengthening existing bridge.

The bridge crossing the Chemung river at Elmira, at Main street in that city, was found to be unsafe for use by the street cars of the Elmira Water, Light and Railroad Company, for the loads now being operated over it, but it would be safe for cars not exceeding certain weights. Under the circumstances the volume of traffic over the bridge was ordered to be diverted by the company, discontinuing the operation of street cars thereon except cars having axle spacing and wheel loads within the limits of the report of the Commission's engineer, and that plans be taken to provide facilities for the balance of the traffic heretofore carried over the Main street bridge to be carried by another route.

BY THE COMMISSION.— It having been suggested by the division of electric railroads that the bridge across the Chemung river at Elmira, at Main street, was probably unsafe for use by street cars of the Elmira Water, Light and Railroad Company, an examination was made by the engineer of grade crossings and a report made to the Commission leading to the conclusion that the bridge is unsafe for the loads now being operated over it but that it would be safe for cars having: Four-foot axle spacing, wheel load 2,700 pounds; six-foot-four-inch axle spacing, wheel load 3,400 pounds; eight-foot axle spacing, wheel load 3,500 pounds.

An order was therefore issued directing the respondent to show cause why it should not discontinue such operation until said bridge is made safe therefor and until further order of the

Commission. Upon the hearing the respondent appeared by its attorneys, its superintendent and its engineer. The mayor of the city of Elmira was also present. The correctness of the report of the Commission's engineer was conceded both by the city and the respondent but it appeared that it would be uneconomical and, in fact, impossible to so strengthen the existing bridge as to make the present operation safe and that legal and financial obstacles, as well as the present difficulty in securing labor and materials, would prevent the construction of a new bridge as contemplated by the city in the near future. The respondent, however, suggested that a portion of the traffic could be handled without very serious inconvenience to patrons over another route, using the Lake street bridge, and that by the construction of about 1,800 feet of new track the Lake street bridge could be used and the present route resumed near the south end of the Main street bridge. Obviously this construction cannot be carried on during the winter but the people using the street car lines which have been operating over the Main street bridge must for the present submit to some inconvenience in order not to be subjected to grave danger. It is therefore ordered:

1. That the respondent, the Elmira Water, Light and Railroad Company, forthwith, upon service of a copy of this order, discontinue the operation of street cars over the bridge on Main street across the Chemung river in the city of Elmira, except cars having axle spacing and wheel loads within the limits of the engineer's report as above set forth, and shall not resume operation with other cars until a new bridge shall be constructed or permission obtained from the Commission.

2. That it proceed as promptly as possible to formulate plans and take the legal steps necessary to provide facilities for its traffic heretofore carried over the Main street bridge by another route.

3. That the respondent notify the Commission within five days after the service of this order as to its acceptance thereof.

In the Matter of the Joint Petition of NIAGARA, LOCKPORT AND ONTARIO POWER COMPANY and SALMON RIVER POWER COMPANY, under Section 69 of Public Service Commissions Law, as to the Niagara Company Issuing \$1,482,128 in Notes or Debentures and as to the Salmon River Company Issuing \$546,000 in Refunding Notes; under Section 70, Public Service Commissions Law, as to Niagara Company Acquiring Capital Stock, Said Refunding Notes and Other Notes of Salmon River Company

Case No. 6007

(Public Service Commission, Second District, January 29, 1918)

Acquisition by a power company of the capital stock, certain refunding notes and other notes of a similar company.

The original petition herein was filed April 25, 1917, and was amended under date of October thirteenth of that year, and on January 15, 1918, a second amendatory petition was filed. The petition as amended sought authority for the Niagara, Lockport and Ontario Power Company, after it had merged the Salmon River Power Company, to execute and deliver to the Equitable Trust Company of New York, as trustee, a certain deed of trust upon all its plant and property to secure an issue of refunding mortgage sinking fund gold bonds to the aggregate amount of \$15,000,000, to be issued as set forth in the petition, and that under the deed of trust above mentioned it be authorized to issue \$1,980,000 face value of bonds to be secured by the mortgage or said deed of trust, to be designated as series A and to bear interest at the rate of 6 per cent per annum. Application granted.

Petition filed April 25, 1917.

First amendatory petition filed October 13, 1917.

Report of division of capitalization dated October 17, 1917.

Order entered October 23, 1917.

Second amendatory petition filed January 15, 1918.

Report of division of capitalization dated January 23, 1918.

Hearing held January 24, 1918.

By THE COMMISSION.—Now, therefore, upon the foregoing record, ordered as follows:

1. That the Niagara, Lockport and Ontario Power Company, after it has merged the Salmon River Power Company, be and it is hereby authorized to execute and deliver to the Equitable Trust Company of New York, as trustee, a corporation organized and existing under the laws of the State of New York, a certain indenture, deed of trust or mortgage upon all its plant and property, to be dated the 31st day of January, 1918, to secure an issue of refunding mortgage sinking fund gold bonds to the aggregate amount of \$15,000,000, which bonds are issuable in series, to bear interest at a rate not exceeding 6 per cent per annum, and to mature not later than February 1, 1958, a copy of which indenture has been filed with the Commission herein, and that the form thereof so filed is hereby approved.

2. That upon the execution and the delivery of said indenture so authorized, which shall not be more than fifteen days from the date hereof, there shall be filed with this Commission a copy thereof in the form in which it was executed and delivered together with an affidavit by the president or other executive officer of the company stating that the indenture as executed and delivered is the same as that herein approved by the Commission.

3. That the Niagara, Lockport and Ontario Power Company be and it is hereby authorized to issue \$1,980,000 face value of bonds to be secured by the mortgage hereinbefore referred to, which bonds shall be designated as series A and shall bear interest at the rate of 6 per cent per annum.

4. That said bonds of the total face value of \$1,980,000 may be sold for not less than 90 per cent of their face value to realize net proceeds of at least \$1,782,000.

5. That the proceeds of said bonds so authorized, which shall be not less than \$1,782,000, shall be used solely and exclusively for the following purposes:

a. To pay off and discharge three-year 6 per cent gold notes of the Salmon River Power Company which mature on February 1, 1918

\$546,000 00

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b. To be applied toward the cost of extensions, additions and improvements of the steam generating plant of the petitioner at Lyons, N. Y., as detailed in Exhibit A attached to the petition in case 6196 filed on September 12, 1917..... \$761,105 60

Less amount provided for by order in that proceeding dated September 18, 1917..... 364,000 00

\$397,105 60

c. To be applied toward the payment of the petitioner's debt and the debt of the merged corporation outstanding at December 31, 1916, and [or] to the reimbursement of its treasury for expenditures from income for the acquisition of fixed assets since April 30, 1912, not obtained from the issue of stock, bonds, notes or other evidence of indebtedness of such corporation.....

838,894 40

\$1,782,000 00

in so far as the same may be applicable provided:

1. That the proceeds of such bonds shall be applied toward the cost of new construction summarized in subdivision (b) hereof only in so far as such new construction is a real increase in the fixed capital of the petitioner as defined by the uniform system of accounts for electrical corporations adopted by this Commission.

2. That there shall be no charges to fixed capital on account of engineering services in connection with such construction unless such engineering services shall have been rendered either by other than the regular officers and employees of the corporation, or, in a proper case, where such services may have been rendered by cer-

tain of such officers or employees under an express assignment to such construction or improvement work.

3. That the unit prices contained in Exhibit A of the petition in case 6196 referred to in subdivision (b) hereof are not intended to be and must not be construed by the petitioner as having been determined upon by the Commission as the actual cost of the property and work to be acquired and done and thus properly chargeable to fixed capital, but are intended and shall be construed only to be a present estimate of the probable cost of such property and work, the actual cost of which must be actual expenditures made as defined by the Commission's uniform system of accounts for electrical corporations.

6. That the Niagara, Lockport and Ontario Power Company is hereby authorized to execute and deliver a trust agreement, to be dated the 31st day of January, 1918, with the Erie Construction Company, and the Equitable Trust Company of New York, as trustee, to secure an issue of two-year secured 6 per cent convertible gold notes, a copy of which agreement has been filed with the Commission herein, and that the form thereof so filed is hereby approved.

7. That upon the execution and the delivery of said agreement so authorized, which shall not be more than fifteen days from the date hereof, there shall be filed with this Commission a copy hereof in the form in which it was executed and delivered together with an affidavit by the president or other executive officer of the company stating that the agreement as executed and delivered is the same as that herein approved by the Commission.

8. That the Niagara, Lockport and Ontario Power Company is hereby authorized to issue \$1,300,000 face value of its two-year 6 per cent secured convertible gold notes under the aforesaid agreement.

9. That said notes of a total face value of \$1,300,000 may be sold for not less than 92½ per cent of their face value to realize net proceeds of at least \$1,202,500, which proceeds shall be applied to the purposes for which the proceeds of the bonds herein authorized are to be used.

10. That the Niagara, Lockport and Ontario Power Company is hereby permitted to pledge the bonds of the aggregate face value of \$1,980,000 herein authorized to be issued as collateral security for the aforesaid two-year six per cent secured convertible gold notes.

11. That the Niagara, Lockport and Ontario Power Company is hereby authorized to use such an amount of the \$1,980,000 of bonds herein authorized to be issued at 90 per cent of their face value as may be necessary to effect the conversion into such bonds at the price aforesaid of the \$1,300,000 face amount of notes herein authorized to be issued in accordance with the provisions of article 6 of the trust agreement herein approved as to form, provided that the face amount of bonds which may be so used shall not be greater than \$1,445,000.

12. That the Niagara, Lockport and Ontario Power Company shall within thirty days from the date hereof and thereafter for each six months' period ending June thirtieth and December thirty-first file not more than thirty days from the end of such period a verified report which shall show:

a. The dates of sales, pledgings and conversions of the securities herein authorized.

b. To or with whom such transactions were had.

c. The amount and character of the proceeds realized from such transactions.

d. Any other terms and conditions of such transactions.

e. With respect to subdivisions (a) and (c) of clause No. 5 of this order there shall be shown in detail the amount of security proceeds used therefor.

f. With respect to subdivision (b) of clause No. 5 of this order there shall be shown:

1. In detail the amount expended of the proceeds of the bonds herein authorized, and the account or accounts under the uniform system of accounts for electrical corporations to which such expenditures have been charged, giving all details of any credits to fixed capital in connection with such expenditures.

2. A summary of the expenditures for each of the purposes set forth in said Exhibit A during the period covered by the report.

3. A summary by the prescribed accounts showing the expenditures during such period.

In reporting under subdivision (f) of this clause there shall be further shown the expenditures of the proceeds of the bonds herein authorized to the beginning of the period reported upon and a total, showing such expenditures to the end of the period.

Such reports shall continue to be filed until all of said securities shall have been disposed of and the proceeds used in accordance with the authority contained herein, and if during any period no securities were disposed of or proceeds used, the report shall set forth such fact.

13. That this proceeding is hereby continued upon the records of the Commission until the examination which is to be made of the books, accounts and property of the petitioner herein shall have been concluded and the corrections, if any, which by reason of such examination this Commission shall determine to be proper and necessary shall have been made, accepted by the corporation and entered in the accounts of said company to the satisfaction of the Commission.

14. That the authority contained in this order to issue and pledge securities is upon the express condition that the petitioner accepts and agrees to comply in good faith with the provisions hereof and before any securities are issued pursuant hereto and within thirty days of the service hereof, the said company shall file with the Commission a satisfactory verified stipulation over the signatures of its president and secretary accepting this order with all its terms and conditions, and such order shall be void and of no force or effect until such stipulation shall have been filed as last above provided.

Finally it is determined and stated, that in the opinion of the Commission the money to be procured by the issue of said securities herein authorized is reasonably required for the purposes specified in this order and that such purposes are not in whole or in part reasonably chargeable to operating expenses or to income, except as to the amount of \$838,894.40. As to this amount the record in this case shows that the company claims that it is enti-

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bled to reimburse its treasury for expenditures made out of income and for obligations incurred in acquiring fixed assets and in making extensions, additions and improvements to its property. The Commission has been unable to make the necessary examination of the books of the corporation to ascertain the facts in this regard and for this reason has felt it proper and necessary to state that the amount of proceeds of bonds last mentioned is reasonably chargeable to operating expenses or income. When the necessary examination shall have been completed and the necessary entries on the books of the corporation as required by the Commission shall have been made the petitioner may apply for a modification of this order in respect of the amount of proceeds of said bonds which finally may be determined by this Commission as reasonably and properly chargeable to operating expenses or to income.

In the Matter of the Petition of the NIAGARA, LOCKPORT AND ONTARIO POWER COMPANY, under Subdivision 3, Section 61, Transportation Corporations Law, and Section 70, Public Service Commissions Law, for Consent to Merge Salmon River Power Company

Case No. 6275

(Public Service Commission, Second District, January 29, 1918)

Merger of a power company in a similar company owning all the stock of the company to be merged.

The Niagara, Lockport and Ontario Power Company owns and holds all the issued and outstanding capital stock of the Salmon River Power Company, having acquired the said stock under authority of this Commission, and is also the guarantor of certain obligations which have been issued by the other company and now outstanding, and desires to take over and merge the Salmon River Power Company pursuant to the statute with reference thereto. Permission granted with the usual restrictions.

Petition filed November 22, 1917.

Report of division of capitalization dated January 9, 1918.

By THE COMMISSION.—It appearing from the record in this case that the Niagara, Lockport and Ontario Power Company is the owner and holder of all of the issued and outstanding capital stock of the Salmon River Power Company, and that it has acquired said stock from time to time pursuant to authority granted by this Commission, and that the said Niagara, Lockport and Ontario Power Company is the guarantor of a substantial amount of obligations which have been issued by the Salmon River Power Company and which are now outstanding, and that the said Niagara, Lockport and Ontario Power Company is now desirous of merging the said Salmon River Power Company pursuant to the provisions of the statutes with reference thereto, it is ordered as follows:

1. That the Niagara, Lockport and Ontario Power Company be and it hereby is permitted to merge the Salmon River Power Company.

2. When such merger is effected the assets and liabilities shall be taken over on the books of the Niagara, Lockport and Ontario Power Company at the amounts shown therefor as of December 31, 1916, modified only by the legitimate corporate transactions of said Salmon River Power Company between that date and the actual date of said merger.

3. That the permission and approval of this Commission be and the same hereby is given to the Niagara, Lockport and Ontario Power Company to exercise all the rights, privileges and franchises now held and enjoyed by the Salmon River Power Company.

4. That when said merger is completed each and every certificate representing the shares of stock issued and outstanding and now owned by the Niagara, Lockport and Ontario Power Company shall be canceled and stamped with a legend showing that said Salmon River Power Company has been merged into the Niagara, Lockport and Ontario Power Company and all of its property, rights, privileges and franchises of every name and description have been transferred and taken over by the Niagara, Lockport and Ontario Power Company.

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5. That the Niagara, Lockport and Ontario Power Company shall notify the Commission in writing promptly after such merger has been completed and the legend has been placed upon the stock certificates as hereinbefore provided and shall set forth in such communication the form of such legend or inscription.

6. That the Niagara, Lockport and Ontario Power Company shall, within a reasonable time after the consummation of the merger approved in this order, file with the Commission all such annual or other periodic reports as the Commission may be required by law to obtain or which it is empowered by law to exact and shall require, concerning its operations and financial or corporate transactions during the period subsequent to the date of such report last filed and prior to the effective date for accounting purposes of the merger hereby approved.

7. That the authority contained in this order is upon the express condition that the petitioners accept and agree to comply in good faith with the provisions hereof and within thirty days of the service hereof the said companies shall file with the Commission satisfactory verified stipulations over the signatures of their presidents and secretaries accepting this order with all its terms and conditions, and such order shall be void and of no force or effect until such stipulations shall have been filed as last above provided.

8. Neither the financial condition of the Niagara, Lockport and Ontario Power Company nor its balance sheet has been passed upon or determined by this Commission; and it is expressly provided and understood that this order is not intended and shall not be construed either as approving or certifying the correctness of said balance sheet or as approving or certifying the correctness of any balance sheet which may be claimed by the corporation after the merger, or as a result thereof.

**In the Matter of the Petition of the LOCKPORT LIGHT, HEAT AND
POWER COMPANY for Permission to Revise its Rates for Elec-
tric Lighting and Power Service**

Case No. 4335

(Public Service Commission, Second District, January 31, 1918)

Two electric light and power companies cannot successfully compete in a small city.

The merger of two different electric light and power companies cannot be made the basis of a claim by the city that the owners of the property shall not be allowed to earn a fair return upon the value of all their property employed in the public service.

No allowance can be made to an electric light and power company for a deficiency of return prior to the time when it acquired the plants and property of several other similar corporations.

The owners of the stock of a company which is operating as a public service company are entitled to a return of at least 8 per cent upon their investment.

Justification for a service charge.

Elements which constitute a fair and reasonable fixed basis of such charge.

Regulation of public service corporations has developed the fact that competition and regulation do not go hand in hand but are directly antagonistic to each other, and it has been demonstrated repeatedly that two electric light and power companies whose entire business is confined to a small city cannot successfully compete and earn a fair return upon the capital invested unless they charge excessive rates for the service performed.

Where a city grants franchises to two different corporations enabling them to compete for the electric light and power business in the community, and the companies are afterward merged or consolidated, the city cannot successfully urge that the owners of the property which was installed for the benefit of the people of the city shall not be allowed to earn a fair return upon the value of all the property employed in the public service. The fact that there may be a duplication of property is due to the situation which was created by the city when it granted two franchises to two separate corporations, and the owners of the property must be allowed a reasonable opportunity to work out of the difficulty.

An electric light and power company which acquires the existing plants and property of two other corporations engaged in a similar

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business for a specific amount of stock and bonds is not entitled to any allowance for a deficiency of return prior to the time when it acquired said properties.

The stockholders of a corporation which invests its money in property employed in the service of the public, and who assume all the risks incidental thereto and endeavor to give the people the kind of service to which they are entitled, should receive a return of at least 8 per cent upon their investment. It is also desirable that the corporation should earn something in addition for surplus and contingencies as this tends to improve the financial structure of the organization and to keep its credit, and it also puts the company in a position where it can and properly should make extensions promptly as and when they are required to give additional service to the public.

A service charge for electricity is justified inasmuch as it tends to make each user of electricity pay a certain portion of the fixed charges which are involved in giving him service. This applies to all classes of consumers of electricity regardless of the quantities used. It is a well-accepted fact that where electricity is sold in small quantities for residence lighting purposes on a flat kilowatt-hour basis, these customers do not ordinarily pay their fair share of the overhead charges which are incurred by the corporation in furnishing the service.

In the present case a service charge of seventy-five cents per month for residence lighting customers is fair and reasonable. While there are certain elements entering into the cost of giving the service which are more or less uniform in every community, yet the amount which may properly be fixed as a service charge in any community depends upon the facts which pertain in each particular case.

Beekman, Menken & Griscom (by Morton G. Bogue), and Storrs & Storrs (by William W. Storrs) for Lockport Light, Heat and Power Company.

W. A. Gold, Corporation Counsel, and Chas. Hickey for the City of Lockport.

Hickey, Thompson & Gold for Electric Consumers Protective Association, the Board of Commerce, and the Manufacturers Association.

CARR, Commissioner.—On May 27, 1914, the Lockport Light, Heat and Power Company, which we shall refer to hereafter as

the Lockport Company, filed its petition with this Commission requesting permission to establish new and revised rates for electric energy in the city of Lockport, N. Y., for the reason that the then existing rates with respect to the method of charging for such energy sold by it were obsolete and unsatisfactory and in some instances discriminatory, and were insufficient to provide a proper amount for the depreciation of the property employed in the public service and a fair return thereon. This application was made to the Commission because of a stipulation made by the corporation on December 20, 1907, and filed with the Commission on December 21, 1907, in a proceeding then pending before the Commission relating to the purchase of the properties of the Lockport Gas and Electric Light Company, hereinafter called the Gas Company, and the Economy Light, Fuel and Power Company, hereinafter called the Economy Company, by the petitioner herein, pursuant to which stipulation it agreed that it would not thereafter increase the rates therein set forth for the city of Lockport without the consent of the Commission. That case will be referred to as No. 74. An order was made by the Commission on the day the stipulation was filed permitting the Lockport Company to acquire the property of the Gas Company and the Economy Company upon condition that it would not thereafter increase the rates mentioned in the stipulation without the consent of the Commission, and those rates are the ones complained of in the 1914 proceeding.

In due course the city of Lockport engaged as its engineer in this case Mr. William McClellan, who was formerly the electrical engineer of this Commission, in order that its interests might be properly protected, and thereafter the case came on for a hearing. The city appeared by its corporation counsel in opposition to the proposed revision of rates, and ample opportunity was given to any of the interested parties in Lockport to appear and give evidence in opposition to any change in the then existing rates. However, no one appeared except the corporation counsel of the city, and its engineer, Mr. McClellan, who testified on behalf of the city. The last hearing in what may be termed the preliminary

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trial of this case was held in Lockport on July 12, 1915. Subsequently to that hearing the engineers of the city, the corporation, and the Commission had numerous conferences, and the facts in the case were considered at length for the purpose of endeavoring to agree on some schedule of rates which would be fair to all of the interested parties under the then prevailing business conditions. They finally succeeded in the month of September, 1915, in working out a new schedule of rates which it was believed would be a very great improvement upon the rates then in force in Lockport, and which would afford the company a fair return upon the value of its property then employed in the public service. We think it proper at this time to quote here the letter of Mr. McClellan dated September 22, 1915, those of Commissioner Carr dated September 27 and 30, 1915, and that of the corporation counsel of the city of Lockport dated September 29, 1915:

"September 22, 1915.

"The Hon. ROY H. ERNEST,

"Lockport, New York.

"DEAR JUDGE ERNEST.—I have been giving much consideration to the very complicated question as to your electric rates in Lockport. I know you have a full realization of the difficulties which we have to meet. It is never easy to raise rates, but it is especially difficult when the rates in existence are so badly disorganized and inequitable among themselves as the rates in Lockport are.

"I have been in consultation with the engineer of the Commission both in New York and in Albany. The question of value, operating expenses and earnings have been combed and recombined. Altogether some twenty or thirty different rates have been considered, including important suggestions made by the engineer of the Commission. In view of the conflicting elements involved in this settlement, it seems almost impossible to get a set of rates which may be regarded as logical among themselves and wholly satisfactory from the standpoint of scientific rate making. One can devise a half dozen sets of rates for the various kinds of busi-

ness, each set of which would give practically the same total earnings. It is only by weighing the commercial and certain local relations of these various sets of rates that a choice can be made. Under these somewhat harassing circumstances I must very frankly advise you that the inclosed set of rates will accomplish what seems to be a necessary end, and with a very reasonable distribution of the burden upon the various classes of consumers. They are in part rates which I have recommended and in part rates which the engineer of the Commission recommended. When I parted with him yesterday, we were in agreement as to the greater availability of this particular set of rates.

"I am not sure how the matter will come up for final adjustment, but I suppose the Commission will communicate with you. You recognize of course, that the position of the Commission is intermediate between the company and the city, which is a rather difficult one to hold. To order an increase of rates in a community is not a particularly pleasant act for any Commission to have to perform, and therefore there are especial reasons for assuming that any rates which it orders will not be higher than what is necessary to permit it to carry out the other part of its responsibility, namely, to give the company justice. I suggest to you, therefore, that should you be approached by the Commission in connection with these recommendations, that you promptly and freely express your willingness to accept them if ordered by the Commission and thus permit the case to be closed without further delay.

"Placing myself at your disposal for any consultation on this subject which you may want, or for any other purpose in connection with the case, I remain,

"Very truly yours,

"WM. McCLELLAN.

"Copy to Hon. James O. Carr,

"Public Service Commission,

"Second District, Albany, N. Y."

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"Case No. 4335

"ALBANY, Sept. 27, 1915.

"MR. ROY H. ERNEST,

"Corporation Counsel,

"Lockport, N. Y.:

"DEAR SIR.— I have before me the letter of Mr. McClellan to you under date of September 22, 1915, relative to proposed electric rates in the city of Lockport.

"The engineers of the Commission have been in consultation with Mr. McClellan representing the city and with the engineers of the Lockport Company for the purpose of endeavoring to arrive at a solution of the problem in Lockport relative to rates. It seems to us as though the schedule submitted in the letter of Mr. McClellan is reasonable to both parties. We would like to be advised if the city will agree upon this schedule of rates as proposed. If this is not done, it will, of course, be necessary for the Commission to prepare a schedule of electric rates for the city of Lockport which it shall determine is equitable and just. It would, of course, be more satisfactory if such a schedule could be agreed upon between the parties and there seems to be no good reason why this can not be done. If, however, you advise us that this can not be accomplished, we will endeavor to dispose of the matter in the alternative way suggested. We will appreciate it if the matter can be decided promptly so the case may be disposed of by the Commission.

"Very truly yours,

"JAMES O. CARR,

"Commissioner."

"Case No. 4335

"September 29, 1915.

"HON. JAMES O. CARR,

"Public Service Commissioner,

"Albany, N. Y.:

"DEAR SIR.— I have your letter of the 27th inst. relative to electric rates in the city.

"In answer thereto permit me to say that some time ago the members of the Common Council and the representatives of the petitioning company made an effort to reach an agreement as to a schedule of rates for electricity and that such efforts were unsuccessful; that it was then understood that the whole matter was to be presented to the Public Service Commission for determination, which has been done.

"The city has employed in this matter Mr. McClellan, an expert of much experience and ability, and relies upon his judgment as to what suggestion should be made to the Commission concerning changes, if any, in the present rates for electricity.

"Furthermore, the mayor and members of the Common Council have explicit faith and confidence in your Commission and are firmly convinced that any final determination which shall be made in the matter and schedule of rates which shall be ordered by the Commission to be put into effect, and which we will be compelled to accept, will do justice to the people of the City of Lockport.

"Thanking you for the courteous treatment which you have already extended to us, I remain,

"Yours very truly,

"ROY H. ERNEST,

"*Corporation Counsel.*"

"Case No. 4335

"ALBANY, Sept. 30, 1915.

"MR. ROY H. ERNEST,

"*Corporation Counsel,*

"Lockport, N. Y.:

"DEAR MR. ERNEST.—I am very much obliged to you for your letter of the 29th relative to the schedule of rates in the city of Lockport.

"In view of all the circumstances and of the fact that the engineers of all parties are practically agreed upon the schedule, it would seem as though the Commission could properly make an

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order putting such a schedule into effect. I will endeavor to have this done within the next few days.

“Very truly yours,

“JAMES O. CARR,

“Commissioner.”

The Commission then made an order on October 5, 1915, fixing a new schedule of rates which might be put into effect in the city of Lockport by the petitioner. The opinion of the Commission which was handed down on the same date is reported in volume IV, Public Service Commission Reports, Second District, page 623. The new rates were put into effect November 1, 1915.

The schedule of rates which the petitioner requested permission to revise, and the schedule authorized by the order of the Commission on October 5, 1915, are as follows:

ELECTRIC RATES IN FORCE PRIOR TO NOVEMBER 1, 1915

Rates for Electric Lighting

First 50 kw.h. per month or less, 10 cents per kw.h.

Next 50 kw.h. per month, 9 cents per kw.h.

Next 100 kw.h. per month, 8 cents per kw.h.

Next 200 kw.h. per month, 7 cents per kw.h.

Excess over 400 kw.h. per month, 6 cents per kw.h.

These rates are subject to a discount of 25 per cent if bills are paid on or before the tenth of the month following that in which current was consumed.

Rates for Electric Power

First 1000 kw.h. per month or less, 2 cents per kw.h.

Next 1000 kw.h. per month, 1.5 cents per kw.h.

Next 1000 kw.h. per month, 1.2 cents per kw.h.

Next 2000 kw.h. per month, 1.0 cents per kw.h.

Next 5000 kw.h. per month, 0.8 cent per kw. h.

Next 10000 kw.h. per month, 0.75 cent per kw.h.

Next 20000 kw.h. per month, 0.7 cent per kw.h.

Next 40000 kw.h. per month, 0.66 cent per kw.h.

Excess over 80,000 kw.h. as above, 0.64 cent per kw.h.

These rates are subject to a discount of 25 per cent if bills are paid on or before the tenth of the month following that in which current is consumed.

In addition to the regular meter rates for electric power, a service charge is made of 75 cents per average horsepower per month, as shown by the kilowatts consumed. Such consumers are divided into either ten or twenty-four hour consumers operating twenty-six working days a month. Dividing the number of working hours in the month into kilowatt-hours as shown by the wattmeter, and dividing this by 746 watts, gives the average horsepower, to which is applied the charge of 75 cents per horsepower per month. Such charge is in addition to the regular meter rates.

Power: Demand rate.

Available: For consumers using primary power and located convenient to the 11500-volt circuits.

Character of service: Continuous a. c. 25-cycle, 11500-volts, 3-phase.

Guarantee: 60 per cent of the maximum minute peak, as per rate below.

Rate: Demand rate (step): 50 to 100 hp. peak at \$22 per hp. per year; 100 to 500 hp. peak at \$20 per hp. per year; 500 to 1000 hp. peak at \$19 per hp. per year; over 1000 hp. peak at \$18 per hp. per year.

Maintenance discounts: None.

Prompt payment discounts: None.

ELECTRIC RATES IN FORCE SUBSEQUENT TO NOVEMBER 1, 1915

Residence Lighting: Available to all residence consumers.

Net consumer charge: 75 cents per month per meter installed.

Net energy charge: 5 cents per kilowatt-hour for first 35 kilowatt-hours per month per meter; 2 cents per kilowatt-hour for all excess.

Minimum charge: None other than consumer charge.

Prompt payment discount: Gross bills to be rendered with 10 cents added to net consumer charge, and discounted to net rate if paid within ten days from date of bill.

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Commercial Lighting: Available to all lighting consumers except residences.

Net rate: 10 cents per kilowatt-hour for first 60 hours' use per month of demand; 5 cents per kilowatt-hour for next 60 hours' use per month of demand; 2 cents per kilowatt-hour for all excess.

Minimum charge: \$1 per month per meter.

Determination of demand: Demand to be considered as 90 per cent of the total installed capacity; no installation to be considered as less than 1 kilowatt.

Prompt payment discount: Gross bills to be rendered with 1 cent per kilowatt-hour added to net rate for first 60 hours' use per month of demand, and discounted to net rate if paid within ten days from date of bill.

Commercial Power: Available to all power consumers.

Net rate: 7 cents per kilowatt-hour for first 40 hours' use per month of demand; 4 cents per kilowatt-hour for next 40 hours' use per month of demand; 1 cent per kilowatt-hour for all excess.

Minimum charge: \$1 per horsepower per month for first horsepower installed; \$0.75 per horsepower per month for each horsepower or fraction thereof in addition.

Determination of demand: Demand will be considered as 75 per cent of the installed capacity if in one motor, and 65 per cent if in more than one motor. No installation to be considered as less than 1 kilowatt.

Prompt payment discount: Gross bills to be rendered with 1 cent per kilowatt-hour added to net rate for first 40 hours' use per month of demand, and discounted to net rate if paid within ten days from date of bill.

Wholesale Light and Power: Available to all consumers willing to guarantee a maximum demand of five kilowatts.

Net demand charge: \$2.50 per month per kilowatt for first 5 kilowatts of maximum demand; \$1.25 per month per kilowatt for each additional kilowatt of maximum demand.

Net energy charge: 1 cent per kilowatt-hour.

Minimum charge: None other than demand charge.

Determination of maximum demand: Actual maximum demand to be determined by tests or measurement.

Prompt payment discount: Gross bills to be rendered with 25 cents per kilowatt added to net demand charge, and discounted to net rate if paid within ten days from date of bill.

Primary Power Rate: Available to all consumers using primary power and located convenient to the 11500-volt circuits.

Net rates: 50 to 100 hp. peak at \$22 per hp. per year; 100 to 500 hp. peak at \$20 per hp. per year; 500 to 1000 hp. peak at \$19 per hp. per year; over 1000 hp. peak at \$18 per hp. per year.

Minimum charge: Consumers must guarantee an amount equal to 60 per cent of the maximum one minute peak.

Determination of maximum demand: Actual maximum demand will be determined by measurement.

Prompt payment discount: None.

On December 6, 1915, the common council of the city of Lockport adopted a resolution directing the mayor and corporation counsel of the city to apply to the Commission for a rehearing in this matter in order that an opportunity might be given consumers to appear or be represented in the case. On December 7, 1915, members of the Carpenters Union and Joiners of Lockport filed with the mayor and common council of the city of Lockport a protest against the action of the Lockport Company in making an increase in its rates for electricity. On December 8, 1915, the Central Labor Union of Lockport made a similar protest; and on December 17, 1915, the Lockport Building Trades Council filed a like protest and approved the action taken by the common council on December sixth, above referred to. Not until May, 1916, did the city of Lockport file its application for a rehearing in this case. The allegations in this application as well as the other two which are hereinafter referred to are all made upon information and belief. We quote the following from the application of the city:

"7. That the average increase to consumers for lighting purposes is unknown to your petitioner but it is believed to be excessive, and the service charge of seventy-five cents is unjustifiable;

that it falls upon that class of citizens who can least afford to bear the burden and has caused general complaint and much bitter feeling.

"8. That in view of the fact that the revised rates have resulted in costing consumers of electricity for power purposes approximately double what they had theretofore been paying, your petitioner believes that some fundamental error must have entered into the calculations of the engineers who agreed upon said revised rates, or that the theory adopted by said engineers in determining said rates was erroneous or else that such theory has failed to work out in practice as was expected."

At the same time a similar application was filed by the Electric Consumers Protective Association, alleging that none of the members of that association took any part in the proceedings before the Commission relating to an increase in rates, that the members had not had their day in court, and that an unfair and unreasonable advantage had been taken of them by the Lockport Company to their great injury, and asking that the rates be revised and reduced to a fair and equitable basis. On the same date the Lockport Board of Commerce, a domestic membership corporation having upward of 500 members, filed a similar application much more voluminous and in great detail, in which it was alleged that prior to the time when the application was made for a revision of rates the superintendent of the Lockport Company, Mr. Kaltwasser, had appeared before the board of directors of the Lockport Board of Trade, the predecessor of the Board of Commerce, and had stated that the company "had a large number of consumers whose consumption of electricity was so small that the company was serving them at a loss and that the purpose of the application was to revise its rates in such a way that said company would not be required to supply such customers at a loss and that the proposed revision would not affect other consumers or if it did affect them, it would be in the way of a reduction of rates," and that the same statement was made to other users of electricity in Lockport. The petitioner further alleged "that said statements of said superintendent were well calculated, if not so intended,

to mislead and to lull the public to a sense of security and such was their effect and while the city government appeared in said proceedings and employed an engineer to look after its interest, still, owing to the fact that said statements to your petitioner through its board of directors was so generally understood and accepted, there was apparently no public or private demand for vigorous opposition to said application and as a result, a revision of rates was agreed upon by the engineer of the Lockport Light, Heat and Power Company and the engineer employed by the city.

"14. That this Commission very properly assumed that the rates so agreed upon were fair and reasonable and approved the same. [The particular rates complained of were the service charge imposed upon residence lighting customers and upon commercial lighting consumers, and the demand charge on wholesale light and power customers. As a matter of fact, there was no service charge in the new rates for commercial lighting consumers.]

"17. That said rates and charges have proved to be unfair, excessive, unreasonable, and have raised a storm of public indignation."

It was also alleged that there was no necessity for the company to maintain a steam plant in Lockport, and that this placed an undue burden upon the consumers of electricity there, and that the company should not be permitted to generate electricity by steam and charge the consumers therefor based upon the cost of steam generated electricity inasmuch as the company had an available supply of power from the Niagara, Lockport and Ontario Power Company, and that the primary purpose of the steam plant was to supply steam heat for use in the city of Lockport. The operations of the company were criticised in various respects, and it was asserted that the values placed upon the property of the company employed in the public service were excessive and had been determined from time to time by the Commission "not simply for the purpose of fixing electric rates but rather for the purpose of borrowing money on said property, and that in the proceedings in which such valuations were determined, little or no

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question was ever raised as to such valuations by consumers who might be interested in keeping such valuations down where they belong." It was also asserted that since the rates were revised the company had been guilty of discrimination in certain respects, and that the increased rates had driven a number of concerns out of business.

The Lockport Company answered each of these petitions in due course, and filed such answers with the Commission on June 15, 1916, denying many of the allegations in the applications. The former superintendent of the company, Mr. Kaltwasser, made an affidavit squarely controverting the allegations to the effect that he had misrepresented the facts in regard to the proposed revision of rates and setting forth certain facts to show that the municipal authorities in Lockport were fully apprised of the proceedings which were being taken by the company for the purpose of obtaining a revision of rates, and that the matter had been given considerable publicity in Lockport through the medium of the newspapers and otherwise. It may or may not be significant that no one appeared at any of the hearings before the Commission subsequent to June, 1916, to give evidence in support of the charges made against Mr. Kaltwasser, and from the record in this case we believe it can fairly be found that ample notice was given to the people of Lockport of the application to the Commission for a revision in rates, and it is of course a matter of record that the common council of the city took the necessary steps to have the city ably represented in the matter.

Just how much disaffection was actually caused by the revised schedule of rates which was approved by the Commission in October, 1915, does not appear anywhere of record in this case except through statements of counsel, but it is interesting to note that it was considered of sufficient importance by the so called "Thompson investigation committee" to justify it in calling upon the Commission to deliver to it in the month of December, 1915, all of the records of the Commission in this case, as well as several of the papers in case No. 74, hereinbefore referred to, and for the committee to hold a session in the city of Lockport in June, 1916.

The first hearing was held on Friday, June 16, 1916, and continued on the following day. At these sessions many of the records of the Commission were incorporated into the minutes of the proceedings of the committee, and witnesses were subpoenaed by the committee to appear and testify. None of these witnesses gave any evidence which would in any way tend to substantiate the charge that the rates fixed by the Commission were unjust or unreasonable or in any way prejudicial to the interests of the city of Lockport, or that the Commission had erred in its determination.

The minutes of these sessions in Lockport will be found on pages 1232-1303 inclusive, and pages 1-105 inclusive, of volumes V and VI respectively, of the Report of the Joint Committee for the year 1916. We quote the following from pages 119, 120 of the report of the Joint Legislative Committee transmitted to the Legislature on March 5, 1917:

"The city of Lockport, through its common council, protested against the rates for electric light and power and applied to the Commission for relief. It applied to the Commission for experts to develop the facts. These were denied by the Commission with the excuse that the force was busy and that in any event the Commission should not take part in the controversy. Facing a rate case, the company with the assistance of the Commission made *ex parte* re-location of the property used in the service, and then it applied for a rate readjustment. The city administration was obliged at large expense to employ experts and then made a perfunctory contest, and the net result was that the city's efforts to reduce electric costs produced an increased income to the electric company of \$42,000 per year, and this by order of a Commission charged by the law with the responsibility of making its own investigations to arrive at the facts pertinent to the subject matter of pending complaints.

"The details of this proceeding are obtainable in the record of the Committee's investigation of the Lockport Rate Case. The investigation resulted in a rehearing being granted in June, 1916."

We believe it the duty of the Commission to vigorously refute

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the assertions made by this committee that its investigation in the Lockport case resulted in a rehearing being granted in that case in the month of June, 1916, or had anything whatever to do with it. The fact is that the applications for such rehearing were not presented to the Commission until the 22d day of May, 1916; they were served on the corporation on the 24th day of May, 1916; the Commission notified the company that it should answer the complaints within twenty days from the twenty-fourth day of May, and notwithstanding the company urgently requested further time within which to answer the allegations set forth in the applications because of the charges therein set forth, an extension of time was refused, and the Commission did on June 14, 1916, fix the 20th day of June, 1916, as the day when the parties would be given a hearing in Albany for the purpose of enabling the Commission to determine whether or not a rehearing should be granted; and on the day when such hearing was held and at its close, the chairman of the Commission made the following statement: "Well, gentlemen, we of course can not pass upon these contesting affidavits. I do state, with my associates' approval, that we are not of opinion that there has been any misrepresentation by the company; we never cherished such an opinion before the hearing or since the statements which have been made today have come to our attention. But upon the application of the city and because of the attitude of the city toward this proceeding, we are inclined to reopen this case, grant a rehearing and afford the city and these petitioners an opportunity to present evidence in the matter. Such an order will be entered."

We have referred to these matters at some length because we think the usefulness of this Commission would be materially affected and it would fall into disrepute if the feeling should spread broadcast that the determination of the Commission in any particular case or in any branch of its work could be successfully influenced by a Legislative committee or any of its members. The Commission started out with high standards when it was first created in 1907, and it has always endeavored to maintain them and we confidently believe it always will.

It was July, 1917, more than a year after the aforesaid hearing, before the parties were prepared to go ahead with the matter before the Commission, and then protracted hearings were held in Albany covering thirteen days altogether. Notwithstanding the storm of indignation which it was stated existed in Lockport because of the revision in rates, none of the users of electricity in that city saw fit to appear before the Commission and present any facts which would be of assistance to it in determining whether or not the rates were in fact unreasonable. Statements at considerable length were made by counsel for the city and the associations hereinbefore mentioned, but the only witnesses who appeared and gave evidence in their behalf, other than a real estate agent who testified as to land values, were the city's second engineering expert, Mr. Ballard, and his assistant, Mr. Husselman. More than eighteen hundred pages of testimony have been taken in this case and many exhibits containing masses of figures were introduced in evidence by both sides in the effort to support their respective contentions. Briefs were filed with the Commission and oral argument was made on December 5, 1917. Reply briefs have also been filed by both sides.

A careful study of the record leads us to believe that the solution of the problem is not nearly as difficult as it might seem from a cursory examination of the evidence of the experts who testified and the figures submitted by them.

There is no complicated question of law involved, but merely one of facts.

There is probably no gas and electric company in the State of New York which has been before the Commission so much since 1907 as the Lockport Company. One of the first cases before the Commission was its application for permission to purchase the property of the Gas Company and the Economy Company, both of which were then engaged in the electric light, power, and steam heating business in Lockport. The Gas Company and its predecessors had been engaged in business in Lockport for more than fifty years. The Economy Company was an off-shoot of the American District Steam Company which was engaged in fur-

nishing steam heat in Lockport in 1905 at the time the Economy Company was formed. While it has been asserted time and time again that the Economy Company was created in good faith to engage in the electric light and power as well as the steam heating business in the city of Lockport, yet we think it may fairly be inferred from all that has transpired that the real purpose of this company was to obtain a franchise in Lockport if possible, and then begin competition with the Gas Company with a view to forcing that company to buy the property of the Economy Company or sell out to it. Be that as it may, the fact is that the common council of the City of Lockport granted a franchise to the Economy Company on October 16, 1905, which enabled it to actively compete in the electric light and power business with the Gas Company, and this condition of affairs continued until 1907, when it was apparent that the two companies could not obtain sufficient business in Lockport to justify the existence of the two companies as separate entities, and as a result, the Lockport Company was formed to take over the property of the two companies and end the then existing competition. The proceeding to effect a sale of the two companies to the Lockport Company was commenced before the Commission of Gas and Electricity, and when the Public Service Commission was formed, this was one of the cases turned over to it and was one of the first to receive its attention. It was given thorough consideration by the Commission as appears from the opinion in the case which is reported in volume I, Public Service Commission Reports, Second District, page 12. At that time the Commission was blazing the trail in matters of this character and had no established precedents of its own to follow. The questions then under consideration were new to the Commission and required an interpretation by it of the law relating to such matters. The question of determining just and reasonable rates was not the one that was being pressed for determination, but rather what capitalization would be proper for the new company. While it is true that the company was required by the Commission to continue in force the rates then existing in Lockport, yet it appears that this was done largely because of the

fact that vigorous opposition was made to the proposed combination of the companies by the people in Lockport on the ground that this would tend to reduce the competition between the two companies, which it was considered was for the best interests of the people there, and that the franchise had been granted to the Economy Company upon the distinct understanding that it would actively compete with the Gas Company. The question involved was the capitalization of the new company, and whether or not there was sufficient property to justify the proposed issue of stock and bonds. The rate question was only brought in as a collateral matter. Certainly the Commission did not attempt to determine at that time that the rates then in force in Lockport should continue forever without change. We think it desirable to quote from the opinion in case No. 74, as follows:

"The petitioner, the Lockport Light, Heat and Power Company, desires to take over the property, franchises, and business of these two companies and carry on the business of supplying gas, electric light and power, and steam heat, in Lockport through the agency of a single corporation. The capital stock of the new corporation, as proposed by the petitioner, the Lockport Light, Heat and Power Company, is to be \$600,000, and the company also asks leave to issue \$600,000 of bonds, making the total proposed capitalization of the new company \$1,200,000. The total capitalization of the two old companies whose properties and franchises are to be taken over is, as appears from figures given above, \$700,000.

"This Commission in July caused an examination to be made of the properties of the Economy Light, Fuel and Power Company and the Lockport Gas and Electric Light Company. The Commission's engineer values the physical property of the Economy company, with no allowance for franchise or good will, at \$291,579.39. As heretofore stated, the capital stock of the Economy company is \$250,000, and it has no outstanding bonds. The Commission's engineer values the physical property of the Lockport Gas and Electric Light Company, with no allowance for franchise or good will, and without attempting to place any

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value on the Beverly contract for water power, at \$433,426.33. The value of the Beverly contract is difficult to estimate. The total capitalization of this company is \$150,000 outstanding capital stock and \$300,000 outstanding bonds. The total physical valuation of both properties found by our engineer is \$725,005.72, and the total outstanding bonds and stock as follows:

Outstanding stock of both companies.....	\$400,000
Outstanding bonds of both companies.....	300,000
Total	<u>\$700,000</u>

"The properties are to be turned over to the new company free of lien or debt, except the outstanding bonds of the gas company.

"First, the city objects on the ground that the two companies whose business is to pass over to the new company have now a total capitalization of \$700,000, while the new company proposes a total capitalization of \$1,200,000. The municipal authorities urge that if the last named capitalization is allowed by this Commission, it will hereafter be claimed that the company is entitled to charge such prices for its products as will enable it to earn a fair return upon such capitalization, and that this would result in gross injustice to the city of Lockport and its inhabitants.

"Section 69 of the Public Service Commissions Law, which relates entirely to gas and electric corporations, contains the following prohibition:

"Nor shall the capital stock of a corporation formed by the merger or consolidation of two or more other corporations exceed the sum of the capital stock of the corporations so consolidated, at the par value thereof, or such sum and any additional sum actually paid in cash; nor shall any contract for consolidation or lease be capitalized in the stock of any corporation whatever; nor shall any corporation hereafter issue any bonds against or as a lien upon any contract for consolidation or merger."

"Technically speaking, the case in question is neither a consolidation nor a merger, but the purchase by a newly formed corporation of the property and franchises of two existing companies.

It will be observed also that the prohibition of the statute is confined to an increase in a merger or consolidation of 'capital stock,' and such prohibition does not expressly apply to increase of bonded indebtedness. The purpose behind the statute, however, is perfectly clear. The provision of law in question is designed to prevent those large increases of capital issues which have so often accompanied the consolidation of public service corporations in the past, and which have imposed heavy burdens upon municipalities in the way of inadequate service and excessive prices through the endeavor by the over-capitalized company to earn interest and dividends on the excessive issue of securities. If this beneficent purposes of the statute can be evaded simply by effecting consolidation in fact by the use of a newly organized purchasing company, without technical merger or consolidation of the existing companies; or if it can be evaded by leaving the aggregate capital stock unchanged, but imposing the same burden upon the community through a greatly increased issue of bonds, the statute totally fails to accomplish the intended purpose. We think it quite clear that the policy of this Commission, in case two or more gas or electric companies in any community are permitted to sell out their property and franchises to one newly formed company, should be to disapprove such sale, unless the total capitalization of the consolidated or new company, whether in stock or bonds, issued in exchange for the securities of the old companies, is kept at such an amount as not to exceed the total capitalization of the vendor companies. The aggregate capitalization—stock and bonds—of the Economy Light, Fuel and Power Company and the Lockport Gas and Electric Light Company at the present time is \$700,000. The newly organized company, formed to buy out these two companies, should not, therefore, be permitted to issue more than \$700,000 of stock and bonds for the purchase of the old companies. It is not important how this capitalization is divided as between bonds and stock. We see no objection to the new company issuing, to consummate these purchases, if they are to be permitted at all, \$550,000 of bonds and \$150,000 of capital stock. The new company would

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have assets representing the full amount of such issues of stock and bonds at their par value, making no allowance or valuation for its established business relations with its customers and contracts with the city authorities, both of which have in fact a real and substantial money value.

"The prices fixed by the Commission are to be the maximum prices to be charged for gas or electricity in such municipality until the Commission shall, upon complaint or upon investigation conducted by it on its own initiative, again fix a different maximum.

"The petitioner in his brief in this case states that the new company is willing to file a written stipulation or agreement with the Public Service Commission that it will not increase the present schedule of rates on electricity and gas in the city of Lockport without first obtaining the consent and order of the Public Service Commission permitting such increase. * * * In case of any increase hereafter in the price of gas or electric light or power in the city of Lockport, the municipal authorities and citizens would have full power to bring the matter before the Public Service Commission in the manner provided in section 71, and such proceeding would find on file with the Public Service Commission a written stipulation and agreement of the companies not to increase their prices without obtaining previous consent from the Commission. The provision for future application to the Commission for permission to change prices is clearly necessary to cover changes of condition which might develop in the future, as for example, an important increase in the cost of producing gas or electricity."

Regulation of public service corporations has developed the fact that competition and regulation do not go hand in hand but are directly antagonistic to each other, and it has also been demonstrated times without number that two electric light and power companies, whose entire business is confined to a city as small as Lockport, cannot successfully compete and earn a fair return upon the capital invested unless they charge excessive rates for the service performed. There is a needless duplication of prop-

erty which is entirely unnecessary, and sooner or later one or the other of the companies must go to the wall and the public must bear the burden made necessary by inviting and fostering competition of this character. Lockport is a concrete illustration of that fact. If the city of Lockport had refused to grant the franchise to the Economy Company the question of the necessity for the maintenance and operation of the present steam plant would probably not have been involved in the question of rates for electricity in Lockport. However, the franchise was granted and each of the companies was obliged to fight for its existence.

Therefore, in view of what has transpired, and inasmuch as the city granted the franchise for the steam heating business as well as electric light and power business to two different corporations, it cannot now successfully urge that the owners of the property which was installed for the benefit of the people in that city should not be allowed to earn a fair return upon the value of the property employed in the public service. This is a situation which was created by the city of Lockport alone, and the owners of the property must be allowed a reasonable opportunity to work out of the difficulty. It is a well known fact that a concern like the Lockport Company cannot always be assured that it will have a never failing supply of hydro-electric power even though it does come from the mighty Falls of Niagara. Delays and interruptions are necessary incidents to the business of transmitting electric energy from the source of supply to the point of distribution over long transmission lines; they are in most instances inevitable. When this happens, all the industries dependent upon this power are subject to serious loss and inconvenience even if the interruption in the service is only for a brief duration. There is hardly an electric light and power company of any consequence in the State which purchases hydro-electric energy for distribution which has not some sort of steam reserve to back it up for the purpose of taking care of interruptions as well as to cut down the peak inasmuch as hydro-electric power is usually sold on the basis of the peak-load demand. It may be that the steam plant will not be called on for weeks at a time to

supply electricity because of the failure of the hydro-electric energy, but when it is needed, it is there ready for use, and it enables the company to continue to supply its customers and reduce serious losses which might result if power were not immediately available. It is considered good engineering practice to have such a steam reserve, and we have found nothing in the record which would justify us in holding to the contrary. Since the application in this case for an increase in rates was made, and as showing the fallacy of the argument that where power from Niagara is available, as in the present case, it is unnecessary to have any steam reserve, there has been developed almost at the brink of Niagara Falls, so to speak, a tremendous steam plant: and this has been done not only for the purpose of insuring a continuous supply of power in Buffalo and vicinity but also to supplement the resources of Niagara Falls; and this development was decided upon before the beginning of the present European conflict. In addition to this, another one of the large power companies distributing electricity generated at Niagara Falls has found it extremely desirable to have a large steam plant at Lyons, N. Y., to take care of interruptions in its source of supply and on its distributing lines, and also to eke out the supply which is available from Niagara Falls at times of peak demand. Added to this, the fact that the power from Niagara Falls has been diverted to uses which are considered of great importance by the Government in these strenuous times, and that the supply of energy from this source is also being materially cut down, and none of the power at Niagara may in the near future be available for Lockport, we think that the fact that there is a steam plant for use in Lockport is of very great importance to the city and its inhabitants and the industries therein, and that the city as well as the company is fortunate in having such a plant available for use continuously if the demand arises. We say this with all due respect to the last engineer which the city employed in this case, Mr. Ballard, from whose testimony it might almost be inferred that a steam plant for generating electricity in Lockport is entirely unnecessary.

The first engineer employed by the city, Mr. McClellan, is a man of excellent reputation as an engineer. He was fully competent to advise the city in this case, and we believe that the advice which he did give it was sound and reasonable. The fact that the representatives of the city have been dissatisfied with that advice does not alter the fact in any way. Merely because the advice which we receive from an engineer is not to our liking, does not establish satisfactorily that the advice is unsound or unfair where there is not satisfactory proof that his findings are incorrect or not based on facts. Mr. McClellan has been very severely criticised in this case, but we think this criticism has been unwarranted by the facts. We think it proper at this time to quote from the report made by him to the city of Lockport with regard to the necessity and justification for a steam plant in Lockport:

"A steam plant is necessary for a proper electric service in the city of Lockport. In the first place, the conditions of the contract of the company with these companies which supply it with power from Niagara, include that the power may be taken off from 1 a. m. to 5 a. m. any day. The power from this source may be cut off accidentally at any time for a more or less protracted period, especially under severe weather conditions. It is desirable that the street lighting and lighting in buildings where crowds are likely to be, should not be cut off. It is true that the city of Buffalo nearby has no auxiliary plant. There are, however, two distinct transmission lines over separate right of way from Niagara Falls, on opposite sides of the Niagara river. There is also a very large direct current system in the busy portion of the town supported by large storage batteries.

"In addition to these circumstances it must be remembered that the investment in the plant is made. The plant has also a practical advantage in that it can be used to cut off the peak of the demand for power purchased under contract. It is extremely difficult to tell whether this will save the company money, or not, under the new contract conditions. Undoubtedly if the company used the plant for twelve months in the year, the peak could be

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kept down. It would take a large amount of investigation, however, and perhaps experiment, to determine if it would be profitable to run the steam plant for this purpose during the summer months when the extra steam could not be used for any profitable purpose. We have not thought it desirable or necessary to expend the time and money on this point when the results would necessarily be unsatisfactory to determine how the investment in the steam plant should be allocated between the electric and steam services.

"The Elm Street plant is designed for this particular purpose. The efficiency of the plant as a power generating plant is not high, and is correspondingly less expensive than would be a highly efficient steam generating plant. This is as it should be. We are of the opinion, therefore, that all of the engine room equipment should be allocated to the electric department.

"The boiler room must be treated somewhat differently. It is very efficient, well equipped, and designed to make steam very cheaply. The boilers are equipped with stokers. It is probable that a boiler plant for an auxiliary steam plant would not be built in this way, but the difference in cost would not be material. The stokers might be used in such a plant or they might be omitted, according to the whim of the designing engineer.

"According to one point of view, therefore, we might allocate all the boiler plant and steam engine plant with the exception of the stokers to the electric service and debit the heating plant with the stokers for the reason that they would be installed only for the continuous generation for steam heating purposes, and in order to reduce as far as possible the expenditure for coal and labor in the manufacture of steam.

"We cannot convince ourselves, however, that this is an equitable solution. There are two distinct sets of customers, each set desiring to get its service at the lowest possible cost. If a separate company were providing the steam service, they would have to build a boiler plant. We have agreed above that an independent electric company would have to build a boiler plant for auxiliary service. There is a tendency for the electric consumers

to regard the steam as a byproduct. There is no reason at all, however, why a steam company should not put its steam through a power generating plant, regarding the power as a byproduct instead of feeding the steam directly into its mains. We have met this same difficulty before in tabulating the cost of lighting and heating in large office buildings.

"There does not seem to be any scientific or truly logical way of allocating the costs of this boiler plant between the two services. There is not sufficient data. In such cases it is necessary to compromise. We are inclined to think that the best solution is to imagine that two companies are preparing simultaneously to give the two services, and suddenly perceiving that each one is investing his money in a separate boiler plant, decide to open negotiations by which one boiler plant will be built, each paying half. If such a hypothesis be reasonable, and we think it is, it is proper for us, without attempting to split hairs, to regard half the boiler plant as belonging to the steam plant. * * *

"Steam Generation, \$19,056.55: There is no question that a part of this cost must be charged out to the steam heating department. In this application the company has charged out 44½ per cent of the same group of expenses for the year 1912.

"As stated above, this steam plant can be used as a straight reserve, operated only when the power supply from Niagara Falls is cut off, or it can be operated so as to reduce the peak of the power purchased from Niagara Falls. There is not information, however, available to determine which would be better operation. We have figured that if this plant were operated as a simple reserve for emergency purposes, approximately 70 per cent of the total operating expenses might be charged to steam. On the other hand, if operated to reduce the peak demand of purchase power, apparently 40 per cent would be charged to steam reserve. For the purpose of this general study, therefore, we shall assume that 50 per cent of the total operating expenses of this station should be charged to the steam heating department."

A great deal has been said in this case with regard to the contracts made by the company for its supply of Niagara power

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and the price paid for such power. Considerable of this is ancient history, and deals with conditions which existed long prior to the time when this Commission was created or the Lockport Company had been brought into existence.

On October 10, 1905, a contract was entered into between the Lockport Gas and Electric Light Company and Niagara, Lockport and Ontario Power Company (hereinafter called the Niagara Company) covering power supplied by the Niagara Company at sixteen dollars per horse power. This contract was subsequently assigned to the Lockport Light, Heat and Power Company. Prior to January 15, 1915, the Lockport Company had taken power under this contract up to about 3,000 horse power. At that time the International Power and Transmission Company (hereinafter called the Transmission Company) was a corporation owning a small amount of property but really acting as a broker for electric power on the outskirts of Lockport, and it was supplying electric energy to three large power consumers. It had a contract with the Niagara Company bearing date April 7, 1906, under which it could obtain a maximum of 20,000 horse power from the Niagara Company at sixteen dollars per horse power. The Transmission Company also has a supplemental agreement with the Niagara Company pursuant to which it receives an allowance or commission from the Niagara Company of fifty cents per horse power on all power purchased by it from the Niagara Company, or which may be sold by the Niagara Company to the Lockport Company or any one else in Lockport. The Transmission Company prior to January 15, 1915, had taken power under its contract to the extent of about 2,000 horse power. A dispute had arisen between the Lockport Company and the Niagara Company as to the amount of power which the Lockport Company was entitled to take under this contract at the rate of sixteen dollars per horse power. The Niagara Company insisted that it was not obligated to supply more than 1,000 horse power at this price, and that the Lockport Company must cease to take power in excess of that amount unless some special arrangement was made therefor in respect to price. The only

other cheap power which was available in that locality was that controlled by the Transmission Company, and it would appear that the object of the Niagara Company was to compel the Lockport Company and the Transmission Company to include in the 20,000 horse power block of the Transmission Company all power required by the Lockport Company in excess of 1,000 horse power. We say this because the parties then in control of the Transmission Company were also largely interested in the affairs of the Lockport Company. Then again this attitude on the part of the Niagara Company was not altogether unreasonable because it had a definite fixed contract with the Transmission Company calling for a maximum of 20,000 horse power only a small portion of which had been used up to that time, and the demands of the Lockport Company, as hereinbefore stated, had been in the neighborhood of 3,000 horse power, and there seemed to be no good reason why these demands should not be combined, there being no evidence that the Transmission Company would call for any increased amounts of power under its contract in the near future, and there being an opportunity for the Niagara Company to dispose of all surplus power which it might have available. In other words, the Niagara Company wished to have definitely determined what its obligations were with respect to the amount of power which it might be called on to furnish, in Lockport as well as elsewhere.

On January 15, 1915, a contract was entered into between the Niagara Company, the Lockport Company, and the Transmission Company which provided that the Lockport Company should take all of its power in excess of 1,000 horse power from the Transmission Company, the power so taken to be considered as a part of the power covered by the contract between the Transmission Company and the Niagara Company. On the same date a contract was entered into between the Lockport Company and the Transmission Company under which it was agreed that the Lockport Company should pay the Transmission Company eighteen dollars per horse power for the power taken under that contract.

If the Lockport Company had been entirely independent of the other two corporations and had been dealing with them at arms length, we might presume that the action which it took was necessary and advisable. So far as we know there was no community of interest between the Lockport and Niagara Companies, but the situation was different as regards the relations of the Lockport and Transmission Companies. The Lockport Company now owns all the stock of the Transmission Company, and at the time in question the Transmission Company stock was held by individuals who exercised a great, if not controlling, influence on the actions of the Lockport Company. It therefore becomes necessary for us to consider whether the Lockport Company was justified in allowing its contract with the Niagara Company to be limited to 1,000 horse power without a contest, and whether the price charged the Lockport Company by the Transmission Company for power was just and reasonable, so that the full amounts paid by the Lockport Company for such power can fairly be included in its operating expenses.

It must be admitted that there is room for argument as to whether the 1905 contract between the Niagara Company and the Lockport Gas and Electric Company, and assigned on January 22, 1908, to the present Lockport Company, entitled the latter company to unlimited power or whether its rights were limited to a maximum of 1,000 horse power. A careful study of this contract, however, leads us to believe that it was intended that the Lockport Company should have all of the power which it might require for the purposes of its business at sixteen dollars per horse power. This is borne out by the fact that this was to be the price for the quantity which was first definitely fixed, and the Lockport Company was obligated to buy its additional power from the Niagara Company. We seriously doubt whether the Lockport Company was justified in giving up this apparent right and then attempting to collect from its consumers any excess amounts involved in the payment of a higher price at least until some attempt had been made to uphold its rights under this contract. Pursuing the matter further, we

find that under the contract of January 15, 1915, the power continued to go to the Lockport Company just as it did before. The Transmission Company was not obliged to make any additional investment so far as we are advised. Apparently the only expense involved in furnishing to the Lockport Company a portion of the large block of power which the Transmission Company had hitherto been unable to sell, consisted in taking the bills rendered to the Transmission Company by the Niagara Company, adding two dollars per horse power, passing them along to the Lockport Company, and receiving payment from the Lockport Company at the increased price. The allowance of fifty cents per horse power, which the Transmission Company received from the Niagara Company under the supplemental agreement, would have amounted to over \$1,000 in 1915, and over \$1,300 in 1916, and this would certainly have been ample to pay it for all the expenses involved in supplying power to the Lockport Company as well as a return on any investment which might have been involved. In this connection, however, we must call attention to the fact that since the Lockport Company has acquired ownership of the Transmission Company's stock, which occurred in 1916, the Transmission Company has been billing the Lockport Company at sixteen dollars per horse power, and figures which we have obtained for the year 1917 show that the Transmission Company has a substantial net income derived from its other business and from the fifty cents allowance.

The additional price was only paid by the Lockport Company during the years 1915 and 1916, but these years materially influence the disposition of this case, particularly as most of the figures herein have been based on operations for 1916. Under the circumstances which we have related, we do not believe that the consumers of electricity in Lockport should be burdened by the additional amounts paid by the Lockport Company for power during these years, and we have adjusted the Lockport Company's reported operating expenses accordingly. The adjustments involved are as follows:

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	1915	1916
Paid transmission company for power....	\$38,692	\$47,490
Amount allowed	34,393	42,213
Adjustment	4,300	5,277
Total paid for electric power.....	47,556	57,584
Amount allowed	43,256	52,307
Adjustment	4,300	5,277

It should be mentioned here that the city made no such corrections in its presentation of the case, although its counsel did call attention to the matter of power contracts in his argument. In the exhibits prepared by Mr. Ballard he used the exact amounts reported by the Lockport Company as having been paid for power, and he stated on examination that he was not familiar with the contracts and did not consider them important, but we are unable to agree with that conclusion.

The city has well said, in its reply brief in this case at page 1:

"The question involved in this case will never be settled until it is settled right. And the only way in which it can be settled right is by getting down to and dealing with fundamentals. And the first great that must be dealt fundamental with and disposed of is this: What was the fair value in 1907 of the electric properties taken over by the present company? With that question settled, everything else will be detail and easy of solution as there have been no marked changes in conditions since then."

The Commission fully approves of this statement, and it believes that when this case is finally determined it will be determined right and that its findings will be just and fair to both parties. In a controversy such as this one we feel that this is an extremely difficult matter because of the apparent differences of opinion on various facts which seem to have been established in this case.

We have endeavored to determine the present value of the property of the Lockport Company used in the electric light and power department in several different ways, and the result which has been obtained satisfies us that the conclusions which we have reached are as nearly correct as it is possible to have them in a

case which presents as many complications as the present one. The first time the affairs of this company or its predecessors were before the Commission it seemed to be necessary to ascertain what property the constituent companies owned and the value of that property so it might be determined whether the corporation was justified in issuing the amount of capital asked for in its petition. For the purposes of that case the property was valued by Mr. Crowell, who was then the engineer of the Commission. Probably the first work which he undertook after he became associated with the Commission was the examination of the Lockport properties. Prior to his connection with the Commission he had for many years been engaged in the electrical business and was familiar with the electric light and power development and the expenditures incident thereto practically from the beginning of the electrical industry on a large scale, so that he had an extensive knowledge concerning the costs of labor and material and other expenses incident to the construction of electric light and power plants and distribution systems. With this in mind we think we may properly infer that the values which he placed upon the Lockport properties did include such ordinary physical overheads as might be properly allocated to the property, and that he intended the values determined by him to represent the value of the property as it then existed, and his report so states. In other words, the values given in his report are the depreciated values of the property including the overheads which he considered properly applicable thereto. If the conclusions which we have reached in this respect are correct, then of course the only depreciation which we are required to consider in connection with the Crowell valuation is that which has accrued since July, 1907. We have taken his report which bears date July 22, 1907, segregated the items pertaining to the electric department, and have added to them the various net amounts expended by the company from January 1, 1908, to December 31, 1916, as shown on the books of the corporation, for the purpose of ascertaining how this compares with the book values of the company, taking the 1912 allocation approved by the Commission as a starting point. The figures used for this purpose are set forth in the tabulation shown on the following page.

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TABULATION A

CROWELL REPORT JULY, 1907

Economy Light, Fuel and Power Co.:

*Land \$15,000, divided same as building.....	\$9,750 00
*Buildings, including architects' fees and interest during construction, \$34,500, apportioned on basis of floor space 30 per cent for engine room 70 per cent for boiler room \$24,150, $\frac{1}{2}$ electric....	\$10,350 00 12,075 00
	22,425 00
Electric plant	18,525 00
Electric distribution system.....	35,910 00
*Steam plant \$45,200, $\frac{1}{2}$ electric.....	22,600 00
Construction account \$21,907.53, $\frac{1}{2}$ electric.....	10,953 76

Lockport Gas and Electric Light Co.:

\$120,163 76

Electric Plant

Electric transmissions and transformer house....	\$10,465 00
Electric distribution system.....	76,600 00
Electric station	82,975 00
Office furniture	750 00
	170,790 00
(No allowance made for materials and supplies or other working capital)	\$290,953 76
†Net additions to electric fixed capital 7/1/07 to 12/31/12....	100,281 09
44 per cent of net additions to general structures, etc., 7/1/07 to 12/31/12	18,817 68
	\$410,052 53
†Net additions to electric fixed capital 12/31/12 to 12/31/16..	64,386 92
44 per cent of net additions to general structures, etc., 12/31/12 to 12/31/16	415 07
Total	\$474,854 52

COMPANY, 1912 ALLOCATION

(With transfers between accounts as made in Case No. 5769.)

Electric Department:

*Land devoted to electric operations:

Elm Street land \$6,000, divided same as building	\$3,900 00
Market Street land.....	2,500 00
	\$6,400 00

* Divisions made by the Commission for this case.

† Contains only described proportions of expenditures for buildings and boilers.

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Organization		\$2,441 93
*Power plant buildings:		
Building proper \$30,825, 30 per cent for engine room	\$9,247 50	
70 per cent for boiler room, $\frac{1}{2}$ electric.....	10,788 75	
Coal trestle, stacks, etc., \$13,045, $\frac{1}{2}$ electric....	6,522 50	
		26,558 75
*Furnaces, boilers, and accessories \$49,065, $\frac{1}{2}$ electric.....		24,532 50
Steam engines		15,200 00
Electric generators		60,000 00
Accessory electric power equipment.....		34,567 00
Miscellaneous power plant equipment.....		460 00
Substation buildings		2,000 00
Substation equipment		16,200 00
Poles and fixtures.....		27,077 00
Underground conduits		11,850 00
Transmission system		7,935 00
Distribution system		34,167 00
Line transformers and devices.....		21,200 00
Electric services		10,658 00
Electric meters		25,899 00
Electric meter installation.....		3,220 00
Municipal street lighting system.....		15,627 00
Commercial arc lamps.....		1,895 14
Glow lamps		4,124 00
Electric tools and implements.....		991 00
Electric laboratory equipment.....		1,114 00
		\$354,117 32
<i>General</i>		
Land	\$12,000 00	
General structures	27,300 00	
General equipment	7,620 00	
	\$46,920 00, 44 per cent electric..	20,644 80
		\$374,762 12
†Net additions to electric fixed capital 12/31/12 to 12/31/16..		64,386 92
44 per cent of net additions to general structures, etc., 12/31/12 to 12/31/16.....		415 07
Total		\$430,564 11

It will be noticed that on the basis of the Crowell report the value of the property December 31, 1916, was \$474,854.52, and

* Divisions made by the Commission for this case.

† Contains only described proportions of expenditures for buildings and boilers.

that the comparable figures on the company's books show a property value of \$439,564.11 as of the same date. In this statement nothing has been allowed for working capital in either set of figures, nor in the company's figures for the various overheads which it is claimed should be allowed in this case. In arriving at these values we have allocated the power plant buildings on the basis of 30 per cent of the value of the buildings at the Elm Street plant to the engine room, and 70 per cent to the boiler room. We have assumed that all of the engine room should be charged to the electrical department, while the boiler room should be charged one-half to the electric department and one-half to the steam plant. We have also allocated one-half of the furnaces, boilers, and accessories to the electric plant and one-half to the steam plant. We are of the opinion that Mr. Crowell in his report estimated the value of the property as it then existed and included something for overheads as we have hereinbefore stated. Just how much this was we are unable to determine, but inasmuch as he stated that the valuations are intended to represent "physical values of going concerns and the equipment is assumed to be in good operating condition," we think he did include in these values some of the overheads which were commonly known in the industry at that time. Since then there has been a much greater development in the matter of overheads due largely to engineering investigations, the improved methods of determining costs of reproduction of electric plants, and to improved methods of book-keeping, and it is quite probable that he did not include all of the overheads which are now usually recognized in rate cases. We say this advisedly because we know that there are many expenses incurred in building up a property of this character which were not given as much consideration in the early days of regulation as they are at the present time. The figures representing present values, as set forth in this tabulation, do not take into consideration the question of the amount of depreciation which should be deducted from the property values shown. The difference between the totals, amounting to something like \$35,000, represents, we believe, the overheads included by Mr. Crowell but excluded by

the company in preparing the 1912 allocation, and it also probably represents some additional depreciation which was taken into consideration by the company in setting up that allocation and which had accrued between the time of the Crowell report and December 31, 1912. When the 1912 allocation was made the company was required to put on its books the labor and material costs of the property as of December 31, 1912, and then set up a depreciation suspense to represent the amount of accrued depreciation. It is well known by the Commission that the company was not given permission to include overheads in making this particular allocation, and we now believe that if the reproduction values had been used at that time and the proper amount had been set up for a depreciation suspense, this case would have presented far less complication. There is a substantial difference of opinion in this case between the representatives of the company and the city as respects the Elm street steam plant and the method of allocating it as between the electric plant and the steam heating plant. The company contends that all of this plant should be charged to the electric utility because it is a peak-load station and also a steam reserve. The city engineer, Mr. Ballard, on the other hand, insists that 80 per cent of this plant should be charged against the steam heating utility and 20 per cent to the electric, while Mr. McClellan in his report to the city stated that it should be divided equally between the two departments. We do not think that the contention of the company, or that of Mr. Ballard, is the one for us to adopt. Steam heating is now and has for many years been a substantial portion of the company's total business. Historically, the steam heating business antedates electric service so far as this plant is concerned, and we do not see how, in justice to the users of electricity, the steam can be considered solely as a byproduct although it must be admitted that commercial steam heating is nearly always considered as a byproduct and could not be sold profitably on any other basis. The city claims that the allocation should be on the theoretical apportionment of the total heat in the steam which is used by the engines for generating electricity and by the steam system for heating. Assuming that

the theory of Mr. Ballard is correct in respect to the manner in which the heat units are distributed as the steam is used, it must be observed that it entirely overlooks the inherently inefficient qualities of engines and steam turbines as devices for transforming heat into work. It is probably a fact that the engines in the Elm street plant take less than 10 per cent of the heat out of the steam and that the balance goes to the heating system, but it should be borne in mind that the engines could not utilize much more than this proportion in any event, and the balance would have to be wasted if not used for heating. In the largest and most efficient plants, using condensers and not doing any heating but designed solely for efficiency in generating electricity, the turbines (which are more efficient than engines) do not utilize much, if any, more than 20 per cent of the heat which comes to them, and the rest is a total loss which up to the present time engineering skill has not been able to overcome. All of the boilers in this plant are required for operating the engines. If the heating system should be abandoned, it would be theoretically possible to cut down the boiler plant by using condensers, but the saving which would be made in the cost of boilers would be largely offset by the cost of condensing equipment. The situation is one, therefore, where the boiler plant is used by both departments in common, but it would be required just as it is by either department standing by itself. We say this having in mind the fact that the company is in the situation where it has the property and it is employed in the public service and has been for many years. In view of that situation, which we are obliged to deal with as we find it, we are of the opinion that the plan advocated by Mr. McClellan of allocating one-half to the electric department and one-half to steam heating is fair, based strictly on the merits as we have discussed them, and that it would not be reasonable to attempt to deal with the steam as a byproduct. Certainly it is not fair to users of electricity to load an unreasonable amount of this expense on them, but on the other hand it is not fair to the steam heating customers of the company to unduly burden them with any portion of the steam plant which should properly be carried by the electric department. The electric

department is not discriminated against by making this allocation, because it appears in the record that the Elm street plant is easily worth to that department its entire cost for use in holding down the peak on purchased power and for use as a standby. Considering the plant from this last standpoint, there is considerable merit in the claim of the company that all of this expense should be charged to the electric department, but as heretofore stated we think that the decision we have made is the most reasonable one under all the circumstances.

The records of the Commission show conclusively, we think, that the figures used by the company in the 1912 allocation were based on labor and material costs without the usual overheads. In the 1907 case the petitions of the Economy Company and the Gas Company alleged that the value of the physical property, exclusive of materials and supplies, was \$873,107.81, and claimed a total value including intangibles of \$1,149,300. These values apparently did not take into account the question of depreciation. There were four affidavits in that proceeding to the effect that the value of the property in question was equal to the amounts set forth in the petitions. Two of these affidavits were made by engineers who stated that they were familiar with the property. Testimony to the same effect was also given on hearings held before this Commission. Mr. Crowell undoubtedly took into consideration the question of depreciation when he made his valuation, as appears from his report, and if the subject of depreciation is considered in connection with the figures of the petitioners above referred to, then the results reached are fairly comparable with those ascertained by Crowell. The 1912 allocation was ordered by the Commission in a capitalization case (No. 2548), because it was found at that time that the books of the company did not show the allocation of its property by items, and consequently it was impossible to follow the different items of property and properly account for the same. In making this allocation it was considered desirable from a bookkeeping standpoint to have the book assets in 1907 equal the face value of the securities then issued so the company would not start out with either a surplus or deficit. On this theory

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is was decided that the fixed capital December 31, 1912, should be \$700,000 plus the cost of additions made since 1907, which brought the total amount of fixed capital to \$948,507.68. This of course included all of the property of the company employed in the gas, steam heating, and electric light and power departments. The allocation first prepared by the company and presented to the Commission for consideration may be summarized as follows:

Labor and material cost.....	\$964,642 00	
Physical overheads	219,840 00	
General overheads	128,179 68	
		\$1,312,661 68
Depreciation		364,154 00
Net		\$948,507 68

This matter was under consideration by the Commission for nearly two years. The books of the company were exhaustively examined by representatives of the Commission and the property valuations were checked by its engineers. The division of capitalization required the company to determine the amount which should be allocated to the different fixed capital accounts without taking into consideration the question of depreciation, and the company was required to reduce its total valuation so as to accomplish this result. It could have been done by scaling down all of the values, labor and material items as well as overheads, but it was finally agreed to drop the question of overheads entirely in making the allocation (the representatives of the company, however, stoutly maintaining that it did not waive its contention that these overheads were considered reasonable and legitimate), and after several changes were made in the values placed on various items to comply with the recommendations of the engineer of the Commission the company did scale the labor and material items down to the value shown in the final allocation as filed and approved by the Commission in its order of December 10, 1913. This did not give any determination as to the total value

of the property, for the figure of \$948,507.68 is made up entirely on the basis of using the limited capitalization of 1907 above referred to as a starting point, and no allowance even was made for the excess property value which existed beyond \$700,000 as shown in the Crowell report. That this assumption is correct and that these figures only purported to represent bare labor and material costs is borne out by the allocation itself and by the report of the engineer of the Commission of September 18, 1913, which states that the figures are reasonable "on the assumption that the amounts * * * represent only materials and labor," and by the evidence which has been given in this case. The 1912 allocation, however, does assist us materially in arriving at total values because it is a reliable showing of labor and material costs. The records show that the company's engineer in preparing it searched the records of the company and used the actual cost figures wherever they could be found, and made an estimate of that cost where the exact figures were not obtainable. In many instances where items were questioned by the representatives of the Commission vouchers were produced to substantiate the figures presented by the engineer of the company. No attempt was made by the Commission at that time to require the company to make an exact allocation as between the electric and steam heating departments. Its principal effort was to see that the proper costs were assigned to the various items of property. It is therefore desirable at this time to try and determine what the reproduction value is of the property employed in the electric department.

First, we will take the labor and material cost of the property as set forth in the 1912 allocation which

was \$397,619 00

Less amount included in land and representing three houses on the property adjacent to the Elm street station and hereafter included in general structures....

2,000 00

 \$395,619 00

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Dividing land and buildings as heretofore discussed
makes the figures for boiler plant:

Land	\$4,200 00
Buildings, coal trestle, and stacks..	34,622 00
Boiler and accessories	49,065 00

\$87,887 00

One-half of this total is to be charged to steam
heating \$43,944 00

\$351,675 00

Add proportion of general land, general structures,
and general equipment (44 per cent) 20,645 00

Labor and material cost of property properly
chargeable to electric department 12/31/12.... \$372,320 00

To these items there must necessarily be added something for the other items of cost necessarily associated with the establishment and creation and development of the property. The fact that the property exists is indisputable evidence that an organization must have been effected, preliminary studies of some sort made, and the enterprise must have been managed and administered in the early stages of its development. There must have been expense for engineering, purchasing property at different times, supervision of the work, and other miscellaneous expenditures of the sort which every one who is familiar with construction work of this character knows it is necessary to incur as a part of the work. These expenses are organization, administration, legal expenses, engineering and superintendence, general expenses, and interest during construction. There are other items claimed by the company, such as piecemeal construction, contingencies, incidentals, and omissions which are to a considerable extent real and which do have an influence on the cost of the property. These are, however, things which should properly be included in the unit costs, and we think they are probably included in the

1912 allocation. In any event they are undoubtedly included in the figures covering additions since 1912 because the books of the company show what its costs have been. There is a wide difference of opinion as to the various percentages which should be used for the various items of physical property, but experience has shown that the cost of creating and putting into operation property of the character which we are considering in this case will ordinarily amount to from 15 to 25 per cent of the labor and material costs, and we think that an allowance of 20 per cent for the general and overhead items above mentioned will be a reasonable amount to apply in this case. No question is involved as to the additions since 1912 as we have stated above. If some of the overhead items since that date have not been charged to fixed capital, but have gone into operating expense, the company will have received a proper credit therefor, and the same will be reflected in the final figures used in arriving at the amount upon which it should properly earn a return. There is at the present time a small item for engineering expense carried in suspense until such time as the Commission shall determine the proper disposition to make of it, but for the purposes of this case it may be included in the fixed capital additions, as it will in no way affect the final determination which is to be made. We then find that the reproduction value as of December 31, 1916, is as follows:

TABULATION B

Labor and material costs 12/31/12.....	\$372,320 00
General and overhead expenses, 20 per cent.....	74,464 00
Cost of additions 12/31/12 to 12/31/16 (including only proper proportion of general items)...	60,968 00
Engineering since 1912	3,834 00
<hr/>	
Total cost of physical property used in electric department 12/31/16 (exclusive of working capital) ..	\$511,586 00
Estimated depreciation 12/31/16	100,000 00

These figures include nothing for promotion expense, cost of financing, development expenses, cost of establishing the business, early losses, or going value. Some of these items are synonymous, and they are not set down with the idea of showing that a large part of the factors has been omitted, but are all mentioned so that there may be no possible misunderstanding as to what is and what is not included. As to depreciation, the record is not particularly satisfactory. The city claims an amount which is about 22 per cent of its total estimated cost. In Case No. 5769 we determined that for the purpose of having the books of the company represent the facts as nearly as possible there ought to be a depreciation reserve of \$74,321.53 against property which was carried on the books at a value of \$506,608.06. This amounts to less than 15 per cent, and it covered the depreciation since 1907. Very few of the overhead expenses were included, and some of those which were included in the foregoing calculation are less subject to depreciation than the labor and material items. A considerable part of the property has been installed within recent years, and some of the oldest and least useful has been retired and has not been included in the figures given. The property is generally in good condition and well maintained. We doubt if the actual depreciation exceeds 20 per cent, which would amount to approximately \$100,000 on the reproduction value above referred to.

For the purpose of ascertaining how these figures would check with those given by Mr. Crowell in his report, we have made some further computations. While that report was not itemized to any considerable extent we can make an approximate allocation of his figures to the electric department. For this purpose we have assigned 30 per cent of the figures for lands and buildings to the engine room of the Elm street plant, and this is chargeable direct to the electric department. The remaining 70 per cent has been assigned to the boiler plant, and one-half of this amount is charged to the electric department and one-half to steam heating. His figures for steam plant cover boilers and accessories, and we have assigned 50 per cent to each department.

As to the construction account of \$21,908 of the Economy Company, we have no definite information as to which department it is properly chargeable. At the time the Crowell report was made, the buildings and equipment were apparently completed. This account probably covered extensions made to both steam and electric distribution systems and not included in the items covering those systems. The steam heating system of that company had been established for a long time. The electric business of the company was in its infancy, and it was being developed in active competition with the gas company, so the fact is that probably the larger portion of this account was for extensions to the electric system. However, for our present purposes, it will be fair, we believe, to charge one-half to each department. The report gives the segregation of the property of the company as between the gas and electric departments. The following then is the distribution of the figures given in the Crowell report:

TABULATION C

	Total	Steam heating	Electric
ECONOMY COMPANY			
Land.....	\$15,000	\$5,250	\$9,750
Buildings.....	34,500	12,075	22,425
Electric plant.....	18,525	.....	18,525
Electric distribution system.....	35,910	.....	35,910
Steam plant.....	45,200	22,600	22,600
Steam distribution system.....	120,537	120,537	.....
Construction account.....	21,908	10,954	10,954
	\$291,580	\$171,416	\$120,164
GAS AND ELECTRIC COMPANY			
Electric plant.....	.....	.....	170,790
Total (exclusive of working capital and material and supplies).....	.....	.....	\$290,954

This was a depreciated value. It is desirable to make some estimate as to the amount of depreciation that was probably considered by Mr. Crowell in arriving at his valuations. We know that the electric plant of the Economy Company was quite new in 1907, and so there was probably only a small amount of depreciation on its electric plant except in the case of the boilers. The gas company had been in business for a good many years,

and we know that much of its property had been installed prior to 1907. It may fairly be assumed that the depreciation on its property amounted to at least 25 per cent. In any event it is reasonable to assume that there was at least a depreciation of \$40,000 from the reproduction cost new of the property of both companies at the time Crowell made his report. We will, therefore, assume that his figure of \$290,954 was made up of a cost new total of \$330,000 and a depreciation of \$39,046, and with this as a starting point proceed to build up the property from cost records since the time of his report. All of the extensions and additions to fixed capital made between the time of his report and January 1, 1908, appear to have been covered in the items charged in 1908. No retirements are shown separately on the books during the period 1907-1912. The retirements during that period were in connection with new facilities which were being installed, and the cost of the old was deducted from the cost of the new and the net figures put on the books. The retirements were not extensive during that period, so that the results which we obtain are not materially affected because of the fact that we are unable to consider each item of additions and retirements separately during that particular period. All of the items chargeable entirely to the electric department have been allocated on the basis which we have heretofore explained. The annual depreciation has been computed on the basis of 2.4 per cent of the cost of the property when new. Checks have been made in detail for selected years and found to be correct so far as depreciation can be correctly determined. On this basis we have made the following tabulation:

TABULATION D

	Cost new at end of period per Crowell report plus net additions at voucher cost	Additions	Retirements	Deprecia- tion at 2.4 per cent on value at beginning of period	Accrued deprecia- tion at end of period
June 30, 1907.....	\$330,000	.....	.....	.....	\$39,046
8 1/2 months 1907.....	330,000	.....	.....	\$3,960	43,006
Year 1908.....	359,833	\$29,833	.....	7,920	50,926
Year 1909.....	387,889	28,056	.....	8,636	59,562
Year 1910.....	414,211	26,322	.....	9,309	68,871
Year 1911.....	435,919	21,708	.....	9,941	78,812
Year 1912.....	449,098	13,179	.....	10,462	89,274
Year 1913.....	472,220	24,486	\$1,364	10,778	98,688
Year 1914.....	499,320	31,012	3,912	11,833	106,109
Year 1915.....	509,620	11,484	1,184	11,984	116,909
Year 1916.....	513,900	14,302	10,022	12,231	119,118
December 31, 1916.....	513,900	.....	.....	.....	119,118

It will be observed that the results obtained in this statement check very closely with those obtained in the preceding statement which was prepared to show the reproduction cost of the property. We are led to believe that they represent with reasonable accuracy the total cost of the property of the company employed in its electric operations as of December 31, 1916, excluding, of course, any allowance for material and supplies and other working capital. To go a step further with this discussion of the value of the property we would call attention to the fact that the present value of the property as shown on the last statement, after deducting depreciation estimated to be \$119,118, would be \$394,782. If we take the amount shown as the value of the property, using Crowell's estimate and adding to his figures the additions which have been made by the company since that time, we have a total of \$474,854.52 as appears from the first tabulation marked "A." From computations made by our division of capitalization in other cases in which this company has appeared before the Commission, it is estimated that the company should have an accrued depreciation reserve of \$99,732 as of December 31, 1916, against which it would be entitled to charge retirements amounting to \$16,482, leaving an amount of \$83,250 to be deducted from the cost of the property based on the Crowell report as shown in Tabulation A in order to determine the depreciated value of the

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property on that basis. This gives us an amount of \$391,634 as such depreciated value. This is a further confirmation, we think, of the methods which we have used in endeavoring to determine the value of the property of the company employed in its electric department.

While it might not be necessary for us to go further in order to determine what we consider the fair value of the property upon which the company is entitled to a return, yet for the purpose of further confirming the results already reached we have made one more computation of figures, taking some of the exhibits of each of the parties and making certain adjustments which we think are proper in respect to the Elm street station and land used in electric operations. This tabulation is based on the figures set forth in the company's exhibit No. 22; and the property values set forth in city's exhibit No. 4, pages 1 and 6, and Exhibit 5, page 1. (Tabulation E.)

TABULATION E, ELECTRIC DEPARTMENT

<i>Company</i>	<i>Reproduction cost, 6/30/16</i>
Land devoted to electric operations.....	\$8,745
Power plant buildings:	
Engine room, 30 per cent.....	\$10,851
Boiler room, ½ of 70 per cent.....	12,660
Transit St. switch house.....	2,000
Water St. substation.....	2,000
	<hr/>
Furnaces, boilers, and accessories, one-half electric.....	27,511
Steam engines	31,865
Electric generators	19,228
Accessory electric power equipment.....	74,435
Miscellaneous power plant equipment.....	52,844
Substation equipment	904
Poles and fixtures	19,685
Underground conduits	36,457
Transmission system	13,686
Distribution system	10,037
Line transformers and devices.....	49,136
Electric services	29,718
Electric meters	16,596
Electric meter installations	30,999
Municipal street lighting system.....	3,645
	43,052

	Reproduction cost
Commercial arc lamps	\$1, 990
Glowler lamps	206
Electric tools and implements.....	1, 099
Electric laboratory equipment	1, 760
	<hr/>
	\$473, 598
Engineering and superintendence.....	2, 507
Law expenses during construction.....	5, 015
Taxes during construction	2, 507
Miscellaneous construction expenditures	2, 507
Interest during construction	30, 100
	<hr/>
	\$516, 234
Proportion of general structures and equipment as per petition:	
Forty-four per cent of land.....	\$12, 000
Buildings	28, 678
General equipment	8, 896
	<hr/>
	\$49, 574
	<hr/>
	21, 811
	<hr/>
	\$538, 045
Working capital, including materials and supplies.....	25, 000
Additions to fixed capital 6/30/16 to 12/31/16.....	11, 298
Organization	2, 442
	<hr/>
	\$576, 785
Less full accrued depreciation as estimated by Perkins (minutes p. 1370)	120, 000
	<hr/>
	\$456, 785
	<hr/>

City

	Cost to reproduce 12/31/16
Land used in electric operations.....	\$7, 422
Excluding amount in general structures.....	3, 207
	<hr/>
	\$4, 215
Structures used in electric operations (excluding general structures):	
Engine room, 100 per cent.....	\$8, 498
Boiler room, 20 per cent.....	4, 374
House for purifying tanks, 20 per cent.....	125
Coal storage and trestle, 20 per cent.....	591
Substation structures	2, 933
	<hr/>
	16, 521

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		Cost to reproduce
Furnaces, boilers, and accessories, 20 per cent electric.....		\$13,745
(Items reclassified to correspond with company allocation would be electric generators \$54,635; accessory electric power equipment \$41,922)		17,357
		23,764
		72,803
		669
		11,395
		48,532
		9,266
		6,122
		57,146
		25,690
		13,186
Electric meters and installations.....		27,131
		23,929
		853
		667
		1,685
		<hr/>
		\$374,657
Miscellaneous construction expenditures		40,119
		<hr/>
		\$414,776
General structures and equipment:		
Land	\$9,008	Proportion to Elec. Dept.
		35.6 per cent.
Buildings	25,792	Proportion to Elec. Dept.
		35.6 per cent.
General equipment..	7,039	Proportion to Elec. Dept.
		about 68 per cent.
		<hr/>
		17,573
		<hr/>
		\$432,349
Materials and supplies		6,200
Working capital		16,513
Coal storage, City's exhibit 5, p. 1.....		1,556
Administration, organization, law expenditures during construction		15,000
		<hr/>
		\$471,618
Increase allocation of structures used in electric operation to make same 30 per cent for engine room and 1/2 of 70 per cent for boiler room, coal storage, etc. Add \$1,686 for engine room and \$6,792 for boiler room plus Husselman overheads 13.43 per cent.		9,617
Increase allocation of furnaces, boilers, and accessories to electric plant to make same 50 per cent plus Husselman overheads 10.31 per cent.		22,744

	Cost to reproduce	
Increase allocation of land occupied by boiler room, purifying room, coal storage, and ash yard to make same 50 per cent of valuation by Husselman		\$824
Add Husselman's valuation on additional land corner Elm and South streets		2,965
Increased allowance for transformers Water Street Station:		
Company's cost	\$13,500	
City's allowance	8,700	
		4,800
Husselman's overhead 10.31 per cent.....		405
Additional allowance on electric generators:		
	City value	Company cost
2 200-kw. rotaries	\$10,645	\$15,000
1 600-kw. frequency changer	7,450	8,600
1 300-k.v.a. syn. motor	3,572	4,800
		6,733
Husselman's overheads 10.31 per cent.....		694
Add 10 per cent for omissions on land, general structures, underground conduits, electric services, electric meters and installations, municipal street lighting system, commercial arc lamps, and electric tools and implements.....		9,662
Add 5 per cent for omission on steam engines and transmission system		1,172
		\$531,344
Less depreciation estimated by Husselman.....	\$97,908	
Plus proportion of depreciation on increased allowances based on Husselman's percentages.....	11,690	
		109,598
		\$421,746

In preparing this statement we have taken the figures of the company as they appear in its exhibit, but have changed the allocation in respect to the Elm street plant in accordance with our views which we have heretofore presented. We have, however, included all of the overheads which it claims and a reasonable amount for working capital. On this basis the reproduction cost of the company's property would be \$576,785. As against this it would, of course, be proper to deduct the amount of accrued depreciation, estimated by Mr. Perkins at \$120,000, and this

would give the net value of the property employed in the public service at \$456,785. In respect to the figures used by the city in its exhibits, we have changed the allocation with regard to the Elm street station in the same manner as we did with the figures of the company in this connection. We have added the various overheads which the engineer of the city has testified are proper, and also the amounts allowed for working capital, material and supplies, etc. While counsel for the city, at page 69 of his brief, says: "As the question whether overheads should be included in the valuations as above discussed is a legal or moral question as applied to the facts of this case, rather than an engineering question, the fact that Mr. Ballard has allowed a substantial item for such overheads should not militate against our contention that no allowance therefor should be made. He is an engineer, not a lawyer, and he naturally treated the subject from an engineering, not from a legal or moral standpoint. He has been more than fair and liberal with the company," yet it is proper for us to say at this time that the question of overheads is neither moral nor legal, but one of fact, and they are actual and real. The city employed Mr. Ballard as its engineer, and we believe it should be bound by the evidence he gave in respect to the overheads.

We have also increased the city's figures for some of the electrical apparatus because we know the costs to the company were considerably in excess of the amount allowed by the engineer of the city. We also know that many of the other unit costs used by the city's engineer are less than the actual cost to the company. For this reason we have deemed it proper to make certain allowances on account of omissions which increase somewhat the city's figures. It is but natural that there would be many omissions of this character in attempting to determine a reproduction value in the manner employed by the engineer of the city. Many of the expenses which undoubtedly have been incurred over a long period of years during which the company has been in operation are bound to be lost sight of in making up a reproduction value where the engineer does not have the opportunity

to work with the figures showing the actual cost to the corporation. The reproduction value as worked out by us on this basis is \$531,344. Mr. Husselman estimated that the depreciation on the property was \$97,908, and to this we have added an amount to cover the depreciation on such increased allowance as we have made so that the total depreciation which it is proper to deduct from the city's figure is \$109,598. This leaves the present value of the property as \$421,746. The difference between this figure and that of the company, amounting to approximately \$35,000, is made up to a large extent in the difference allowed by the two engineers for interest during construction, and the balance is probably due to differences in other overheads and in the unit costs for various items of property. It is significant, however, that the two computations can be brought so closely together, and if our method of revising the figures of both the city and the company is correct, then it will be seen that there is really not very much difference between the parties as to the actual value of the property employed in the public service.

The company asserts that it is entitled to a substantial amount for going concern value, and in its Exhibit No. 18-a it attempts to show that it is entitled to at least \$304,000 for this purpose as a minimum. It arrives at this amount by certain formulas, using figures from the books of the company, reports to the Commission, and other records of the corporation over the period from 1897 to 1917. It claims that these computations show that the actual deficiency of return upon the property employed by it in the public service during this period, without adding the deficiency each year to the capital entitled to a return for the succeeding year, amounts to \$304,782. It cites the case of Kings County Lighting Company, 210 N. Y. 479, and the theory adopted by the special committee of the American Society of Civil Engineers appointed to formulate principles and methods for the valuation of railroad property and other public utilities. While the argument of the company may be sound, yet we do not think it can be supported by the facts in this case. The Lockport

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Light, Heat and Power Company bought the property of two separate corporations as it existed on or about January 1, 1908. It acquired all of the physical property owned by those companies as of that date, including their contracts, franchises, rights, privileges, etc., free and clear of all lien and debts excepting the outstanding bonds of the Lockport Gas and Electric Light Company amounting to \$300,000, and delivered in exchange therefor a certain amount of stock and bonds. It started its business as the owner of the property of those underlying corporations, and it must be assumed that for the purchase price it acquired such intangible assets as going concern value, right to do business, development expenses, etc. In other words, the owners of the underlying properties had expended such amount as might have been necessary to acquire these intangible assets and they were included in the purchase price. The new company did not acquire the right to tax the people in the city of Lockport for any going value or deficiency of return in those early years prior to 1907, for the owners of the properties during that period made no claim that they were entitled to anything on that account so far as the record in this case discloses. We are of the opinion that they parted with this intangible asset, for such it can be termed, when they parted with the properties for a certain specific price representing on the surface at least what they considered the assets to be worth. To hold otherwise would, we believe, be manifestly unfair to the present and future customers of the Lockport company. As a matter of fact that corporation has never sustained any of those losses in the years in question "due to losses or expenditures which were necessary and proper in developing efficiency and economy of operation and in establishing a business," using the words of Judge Miller in the Kings County case, for the reason that it never came into existence until the year 1907, and it was not until December twenty-first of that year that this Commission made an order authorizing it to purchase the property of the two corporations hereinbefore referred to; so while we recognize that deficiency of return or going value, or whatever it may be termed, is something to be reckoned with

and must always be given full consideration in a rate case, yet in the matter that is now before us we must and do determine that the question of going concern value must be dealt with for the years 1908-1916 inclusive only, and if we find there is such a deficiency a proper allowance should be made therefor in ascertaining the valuation upon which the company is entitled to a reasonable return. While the company attempts to show that it could fairly justify a claim of going concern value to the extent of \$304,000 as above mentioned, yet its engineer stated on the hearing that it was realized that it could not reasonably expect to earn a return on that amount because the company could not exact rates which would enable it to obtain that return, and that it was believed that it should be allowed at least \$95,000 for going value or deficiency which represents the accumulation in that respect from the year 1897 to 1908, notwithstanding the fact that in its Exhibit No. 18-a it arrives at a deficiency of \$241,466 for the period from 1908 to 1916, inclusive.

The city contends that no allowance should be made for going value because the company has had a fair return upon all of its electrical property during the years 1908 to 1916, inclusive, and its engineer attempts to justify this by certain figures which appear in city's Exhibit No. 5, at page 7. These computations were made by taking the reproduction value, depreciated value, and investment value as of December 31, 1916, as determined by the city's engineer, and then working back to and including the year 1908. For this latter year it appears by this exhibit that the value of the depreciated property is only \$10,658 less than the cost of reproduction new of the same property. It is apparent that this is incorrect because some of the property in the electric department had been in service as far back as 1894 at least, and beyond that, Mr. Crowell found that the physical value of this property in 1907 was \$290,953.76, without making any allowance whatever for working capital. Beyond this the investment value which Mr. Ballard takes as a starting point at December 31, 1916, includes \$31,713 for working capital, material and supplies, and administration, organization, and other expenses, and it must

be assumed that these same figures, or a substantial part of them, are included in the investment value at the beginning of the year 1908, which is placed at \$246,525. In considering this exhibit it must also be borne in mind that only 20 per cent of the reproduction cost of the furnaces, boilers, and accessories has been allocated to the electric plant; also 20 per cent of the power plant structures occupied by the boiler-room. Apparently no allowance has been made for retirements, and the return is figured on the value of the property at the beginning of each year. The amount allowed as a return upon the investment has been figured on the basis of 7 per cent. For the purpose of showing that the method employed by Mr. Ballard in making these computations was incorrect, the company, in connection with its evidence, introduced Exhibit No. 27 which its witness, Wheeler, testified was prepared by him. He stated that he had taken the figures presented by the city's engineer and had carried the computation back to the year 1897, using the same methods as those employed by the engineer in preparing the figures which we have just been discussing, and that the result showed that the cost of reproducing the depreciated property as of June 30, 1897, was about \$4,734, and the value of the depreciated property at that time was about \$15,311. We think these figures speak for themselves. Suffice it to say that even as far back as 1897 the city of Lockport was being supplied with electricity for lighting and power purposes by the Lockport Gas and Electric Light Company, its streets were lighted by electricity, and it is doubtful if this could be done at all successfully by a plant which could be reproduced new for the modest sum of \$4,734.

The figures presented in the city's Exhibit No. 5, at page 7, which we have been discussing, are the ones on which the city relies as establishing the fact that the company has earned a fair return on its property after providing for all its fixed charges and depreciation. A return on the investment of 7 per cent is assumed to be reasonable and sufficient. It is apparent what a very substantial change there would be in the result shown on this exhibit if the proper allocation was made of the Elm

Street steam plant and the return was figured on the basis of 8 per cent of the value of the property. As regards the rate of return there are of course differences of opinion. Some will argue that 6 per cent is a fair return, citing the Consolidated Gas case as an authority. On the other hand, there are decisions of this Commission, as well as that of the First District, in which a rate of 8 per cent has been found reasonable for companies doing a larger volume of business and which are perhaps more prosperous than the Lockport Company. We know that in recent years the cost of money for companies such as the one now before us has been steadily increasing, particularly where the corporation is not earning enough to provide a proper depreciation reserve out of its earnings. During the past three years it has been possible at almost any time to invest money in far more reliable securities than those of the Lockport Company at rates which will give a return equal to and in many instances in excess of 8 per cent. Then again it is a well-known fact that the securities of a corporation the size of the Lockport Company are not in demand. They have no ready market and the holders are not able to dispose of them readily in case it is desired to sell them or becomes necessary so to do. We know that at the present time it is difficult, if not impossible, for such a company to sell its securities at any price, and the fact that the company might be able to pay its stockholders a return of 8 per cent on their investment would not make any substantial demand for them. Beyond this it is not known how long the present situation is to prevail. People who are versed in financial matters believe that rates for money will be high for several years after the present unusual conditions have become a thing of the past and the world has been restored to normal conditions. We believe that those who invest their money in the service of the public in a city the size of Lockport, and assume all of the risks incidental thereto and attempt to give people the service to which they are entitled, should receive a return of 8 per cent on their investment and that the sum is reasonable and fair. The State of New York is not a

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pioneer in recognizing that such a return is not unreasonable, for decisions to that effect have been made throughout the country and in sections where the rates for money are as reasonable in ordinary times as they are in New York. We therefore consider that the Lockport Company is entitled to a return of 8 per cent upon the value of the property employed in its electric department in the public service.

In order to show what the result has been of the company's operations since 1907, we have prepared two sets of figures, the first one of which is as follows:

TABULATION F
Statement Showing Annual Accumulated Deficiency of Return January 1, 1908, to December 31, 1916

YEAR ENDED DEC. 31	(a) Average fixed capital invest- ment	(b) Working capital	(c) Total capital for computing return	(d) Gross revenue	(e) Operating expenses and taxes (depre- ciation excluded)	(f) Net operating revenue	(g) Return on capital at 8 per cent	(h) Deprecia- tion	(i) Necessary net revenue	(k) Deficiency of return	(l) Accum- lated deficiency of return
1908	\$274,637	\$12,000	\$286,637	\$99,292	\$82,000	\$17,292	\$22,931	\$8,444	\$31,375	\$14,083	...
1909	303,582	14,000	317,582	116,602	98,503	27,099	25,407	9,376	34,783	17,719	\$21,767
1910	330,771	16,500	347,271	134,081	113,896	20,185	27,782	10,132	37,914	17,984	39,086
1911	354,786	17,500	372,286	144,830	114,996	29,833	29,783	10,641	40,424	10,581	50,087
1912	372,229	19,000	391,229	152,371	122,945	29,426	31,293	11,038	42,326	12,930	63,097
1913	380,380	19,000	400,380	154,678	123,574	32,104	32,750	11,558	44,308	12,204	75,201
1914	415,491	19,000	434,491	152,437	124,395	28,042	34,759	12,383	47,142	19,070	94,271
1915	434,181	20,000	454,181	161,959	128,058	33,891	36,335	12,981	49,316	15,425	109,695
1916	441,481	25,000	466,481	203,693	139,985	63,708	37,318	13,179	50,497	15,371	99,485

(a) Figures in this column prior to 1913 have been arrived at by restating the investment in each year by deducting additions in each year from figures in allocation at December 31, 1912. Figures for 1913 to 1916 inclusive include 1912 allocation figures plus yearly net additions. All figures have been re-stated upon accepted bases for division between Steam and Electric departments, and to the fixed capital balance at the end of each calendar year has been added one-half of the additions in the following year for the purpose of securing the average investment per annum.

(b) Working capital has been arrived at by using \$25,000 in 1916 as a proper allowance, and by reducing such amount in 1916 for each of the other years upon a proportionate basis determined by the ratio of gross revenue in each of the other years to gross revenue for the 1916 year, the volume of business (revenue), dictating the amount of working capital required.

(c) Equals (a) plus (b).
(d) Gross revenue from electrical operations as shown by the company's annual reports filed with the Commission.
(e) These figures have been arrived at after consideration of the details supporting the company's allocation of expenses. The only exception to this is in 1908 where such details are not clear and where an estimated figure of \$82,000 is used, the company's figure being \$83,090, and Ballard's figure \$81,557.

(f) Equals (d) minus (e).
(g) Equals 8 per cent upon (e).
(h) Figures in this column have been developed by applying the rates for depreciation which have heretofore been recommended by this division and accepted by the company in connection with capitalization proceedings to the details making up column (a).
(i) Equals (g) plus (h).
(k) Equals (i) minus (j).

The method employed in determining the deficiency of return is explained in detail. The figures representing the average capital investment make no allowance for the related overheads during construction, such as engineering and superintendence, taxes, insurance, law expenses, and miscellaneous construction expenditures which existed as a part of the cost of the property as of January 1, 1908. That there were such overhead expenses is beyond question, and the various statements which we have heretofore referred to at length support this conclusion. But even taking the bare labor and material costs with such overheads as may have been included since 1908 which we know are small in amount, it appears that the deficiency of return on an 8 per cent basis since 1907 has been \$96,485. Some explanation should perhaps be made at this time of the method used in determining the amount of operating expenses of the company during those years. The principal difference between the company and the city during the period under consideration is due to an error in distributing the expenses of the Race street station and the allocation of the expenses of the Elm street boiler plant. Mr. Ballard made his allocation of expenses for the Elm street station on the same basis that he used in allocating the physical property, namely 80 per cent to steam and 20 per cent to electric. For the reasons which we have explained at length, we do not think this is the proper division, and we have divided the expenses on the same basis as we divided the physical property. On this basis we find that the operating expenses for 1916 are as follows:

TABULATION G

1916 Expenses

	Total	Chargeable to Electric Dept.	Basis
Fuel and handling	\$31, 126	\$9, 450	5 lb. per kw.h.
Boiler labor	2, 619	795	Fuel basis
Engine labor	992	992	All
Electric labor	972	972	All
Water	1, 562	475	Fuel basis
Lubricants	426	320	75 per cent
Production supplies	422	211	50 per cent

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	Total	Chargeable to Electric Dept.	Basis
Station expenses	\$474	\$237	50 per cent
Repairs furnaces and boilers.....	2,309	1,155	50 per cent
Boiler app.	1,924	962	50 per cent
Steam acc.	4	2	50 per cent
Recip. engines	18	18	All
Pr. plant bldgs.	76	51	65 per cent
Acc. elec. equip.....	9	9	All
Superintendence	537	268	50 per cent
Total Elm street plant			\$15,917
Expenses Race street			8,921
Niagara power			52,307
Water power			11,392
Total production expenses			\$93,814
Total transmission expenses			323
Total distribution expenses			9,380
Total utilization expenses			6,731
Total commercial expenses			3,201
Total promotion expenses			3,737
Total general expenses			22,005
			\$133,914
Less duplicate charges			1,473
Total			\$132,441

To the amount of \$132,441 representing the operating expenses as shown on the foregoing statement, we must of course add taxes and depreciation. We have assumed that five pounds of coal per kilowatt-hour is a fair charge to the electric department in 1916 by reason of the small amount of electricity generated at the Elm street station. Mr. Perkins and Mr. Ballard both estimated it at four pounds, but the amount of coal used would have been much more than five pounds if the plant had been operated as a separate electric station. Even on the basis of five pounds per kilowatt-hour, and with the distribution for 1916 as shown in the foregoing statement, there is but little difference between the figures of the city and the company when the difference in the allocation of the expenses is taken into consideration. We have followed the same method of allocating the expenses of the Elm street

station during the years prior to 1916 except that we have taken the fuel on the basis of four pounds per kilowatt-hour which was agreed to by both Ballard and Perkins.

Tabulation H was prepared in the same way as the statement marked F except that the fixed capital at the beginning of 1908 was the amount determined by Mr. Crowell in his report, and to that figure there has been added the amount expended for net additions to the property during the subsequent years as shown by the books of the corporation.

The deficiency of return determined in this manner for the period in question amounts to \$111,836, and is probably more nearly correct than the amount of \$96,485 due to the method employed in making the determination. It is interesting to note that there has been a deficiency of return in every year beginning with 1908 except in 1916, when the company had a surplus over and above a return of 8 per cent on its investment after making due allowance for its operating expenses, taxes, and depreciation. It is desirable that the company should earn something more than the bare 8 per cent return upon its investment so that it may have a surplus and be able to provide for contingencies. This all goes to improve the financial structure of the organization and help its credit. That it was able to make this showing in 1916 is probably accounted for by the additional earnings derived by the company in that year because of the revision of its rates which went into effect November 1, 1915, by the readjustment which we have made in its power bills hereinbefore referred to at length, and in part also, we presume, because of the additional volume of business transacted by the company in the year 1916. The figures in the statements F and H seem to support the contention of the company that it was entitled to have an increase in the rates which were in force in Lockport when this proceeding was first commenced.

Now let us consider the vexing question of rates which seems to be the cause of all the controversy. As we have heretofore stated, the rates which have been attacked were authorized by the order of the Commission made on October 5, 1915, and they went

TABULATION H

Statement Showing Annual Accumulated Deficiency of Return January 1, 1908, to December 31, 1916 (Based on Crowell Figures, January 1, 1908, Plus Book Additions)

Year Ended Dec. 31	(a) Average fixed capital invest- ment	(b) Working capital	(c) Total capital for computing return	(d) Gross revenue	(e) Operating expenses and taxes (depre- ciation excluded)	(f) Net operating revenue	(g) Return on capital at 8 per cent	(h) Deprecia- tion	(i) Necessary net revenue	(k) Deficiency of return	(l) Accumu- lated deficiency of return
1908	\$305,871	\$12,000	\$317,871	\$99,262	\$82,000	\$17,262	\$25,430	\$7,920	\$33,350	\$16,058	...
1909	334,815	14,000	348,815	116,602	89,503	27,099	37,905	8,636	36,541	9,442	\$25,500
1910	362,074	16,500	378,574	134,061	113,866	20,195	30,280	9,309	39,590	19,391	44,894
1911	386,019	17,500	403,519	144,839	114,966	29,843	32,282	9,941	42,223	12,380	57,274
1912	403,462	19,000	422,462	152,371	122,965	29,406	33,797	10,462	44,259	14,853	72,127
1913	421,613	19,000	440,613	154,678	122,574	32,104	35,249	10,778	46,027	13,923	86,050
1914	446,724	19,000	465,724	152,467	124,395	28,072	37,258	11,333	48,591	20,519	106,539
1915	465,424	20,000	485,424	161,959	128,068	33,891	38,834	11,984	50,818	16,927	123,493
1916	472,714	25,000	497,714	203,693	139,985	63,708	39,817	12,231	52,048	11,660	111,836

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into effect on November 1, 1915. They were agreed to by the city, the company, and the Commission. As between those and the ones now adopted by Mr. Ballard, as the engineer of the city, there are material and fundamental differences. The rates now in force were intended to be as simple and workable as possible and to follow the general trend of service costs so that each class and each individual would pay the amounts which bear some relation to the expense to which the company is subjected in serving electricity to its customers. The rates proposed by Mr. Ballard are based on general average principally and have not been prepared upon any of the bases which are now recognized as being proper and desirable in connection with the sale of electric energy. It is true that they are simple, and possibly they may be preferred by some of the consumers in Lockport, but we doubt if any substantial proportion of the customers of the company would seriously advocate such a rate if they fully understood that it resulted in many consumers paying much less than it costs the company to serve them while others paid a substantial amount above the cost. We think the fair and equitable way is for each user of electricity in small quantities to pay his fair share and no more.

The principal attack was made on the service charge for residence lighting. It was argued that the small consumer was made to pay more than a fair amount for his electricity and that there was no justification for such a charge. Because an increase is made in the amount that the small consumer has paid in the past, due to the fact that he has not been paying his fair share of the burden incident to his service, is no reason why he should get that service at the expense of the other consumers who use larger quantities of electricity. We have never seen any plausible explanation of the theory that the consumer of small quantities of electricity should be supplied at less than the cost to the company serving him. As a matter of fact such a claim can not be successfully defended. It is argued that the service charge raises the rate of the small consumer who is least able to pay and lowers that of the larger consumer who is presumably in better financial circumstances, yet we will not presume to, nor does the law

require us to, compel a company supplying electricity to furnish it to the small consumer at less than cost and at the expense of those who may be better able to pay; and yet this is the inevitable result if electricity is sold for residence lighting purposes on a flat kilowatt-hour basis.

Rate making in the early years of electrical development and at the time when the rates prevailing in Lockport were continued in force, pursuant to the stipulation made in case No. 74, was not understood as well as it is today, and the rates of the small companies for lighting and power purposes were usually based on quantity consumption without regard to the cost of the service, which was supposed to be absorbed in the charge for the electricity. As a result the rates were high and necessarily so, otherwise the companies would not have been able to earn their operating expenses and ordinary fixed charges to say nothing about a return on their investment. As time went on changes in rates were found to be necessary due to the demand of the business, the necessity for increasing the output, and in order to make the use of electricity not only desirable but profitable for both parties. So far as the sale of power for industrial purposes is concerned, it was found many years ago that there had to be something in the nature of a fixed charge paid by the consumer to represent the cost of serving him so that the company would be reimbursed for the investment which was required to enable it to supply the electricity, whether the customer used it or not. This was and is known as the demand charge, and is in use almost universally by companies selling power for industrial purposes, and it is recognized as right and proper. If we call this a service charge it is the same thing. For years there has been a demand charge paid by power users in Lockport, and so far as we know, it has never been seriously attacked until the present case. No facts were presented by the engineer of the city as supporting his claim that the rate schedule presented by him was a proper one and better for all concerned than the one now in force. The principal justification from his standpoint was that the rate which he proposed was in his opinion a good one and would produce sufficient revenue

to enable the company to earn a proper return on its investment. As against the opinion so expressed by him we find a rate in force which meets the views of practically every engineer who has studied the subject of electric rates from the time of Wright and Hopkinson down to the present day.

We could present numerous citations in support of the form of rate schedule which has been subject to so much criticism in this case. The Commission discussed at some considerable length the subject of rates for electricity in the Buffalo rate case (III P. S. C., 2 N. Y. 739-801, 802), and the fundamental principles there brought out show conclusively that much more than the mere number of kilowatt hours used by any consumer must be considered if those who use electricity are to be fairly treated. Mr. Ballard presented a number of curves to show the operation of the present and his proposed rates. We are at a loss to understand why these were introduced in evidence because they present the best argument against the rates proposed by him and in favor of those now in force. While it is true that the present rates do not in all cases make a smooth curve and do not follow exactly the trend which might be desired, yet they make no such broken and unreasonable curve as do those of the Ballard rates. Mr. Ballard admitted that the cost of serving an ordinary residence customer would be at least one dollar per month, and it might be as much as one dollar and fifty cents per month, exclusive of the energy charge. He frankly stated that fifty cents per month is not enough to cover interest, depreciation, taxes, and cost of taking care of the meter. These costs do not disappear as soon as the consumer begins to use electricity; they do not change at all but remain constant; and after making the necessary investment to give the service, reading the meter, making out the customer's bill, and doing the necessary bookkeeping, which is incidental to his business relations with the company, the only additional expense involved in supplying him with electricity is the cost of the electricity itself, including of course the transformer losses which are continuous during the hours when current is on the line. If it costs exactly the same to render service

to two adjacent residences, except as to the electricity actually furnished, why should the cost for one become twice as much as the other as soon as one of these residences uses ten kilowatt hours and the other twenty kilowatt hours, and what is there to justify charging one twice as much as the other? Why should not the customer who wishes to use any considerable amount of electricity be able to get it substantially at cost after he has paid the fixed charges of serving him? Most of the current used in Lockport is purchased at a price of sixteen dollars per horse power. If a residence only used electricity for two hours a day, the current alone would cost the company less than three cents per kilowatt hour, and if electricity is used more hours per day the cost per kilowatt hour would be less. If the kilowatt-hour rate was made three cents, the service charge would have to be one dollar and fifteen cents per month in order to produce the same amount of revenue. In the original petition in this case a careful and elaborate cost analysis was submitted, showing that the "customer" cost amounts to twenty-two dollars and eighty cents per year, exclusive of "capacity" and "current" cost. There is also the testimony of Mr. Ballard in the record that the customer cost will be at least one dollar per month. From the facts which have been presented in this case, an equitable rate for residence lighting in Lockport would be a service charge of something in excess of one dollar per month, and an energy charge of something less than three cents per kilowatt hour. The representatives of the company, as well as those of the city, and the Commission, who were instrumental in working out the existing rate fully recognized that the service charge ought to be more than seventy-five cents per month and the energy charge lower than the one which was fixed, but it was considered that it would be inadvisable to go any further than they did along lines which were new in respect to the method of selling electricity in Lockport and which would materially affect many consumers who prior to that time had not been paying a fair charge for the service rendered to them. The same observations which have been made with regard to the residence lighting might be applied to other

classes of service in Lockport, and it could be easily shown that the service or demand charges should be higher and the energy charge lower. If we were inclined to recommend any revision in the present rates, we believe it should be in the opposite direction from that recommended by the engineer of the city. The present rate schedule is probably not perfect, and we presume none of them ever are, but yet we do not see that anything has been presented in this record to show that the rates proposed by the city are better than the ones now in force, nor has there been presented any good reason why they should be adopted, having in mind the correct principles which should be applied in determining proper rates for selling electricity.

We believe that Mr. McClellan, in his report to the city, well stated the case when he said:

"There are three elements of cost connected with the service of electricity to a consumer.

"*First*, the company has certain expenses of which bookkeeping, meter-reading, billing, collecting, etc. are typical for every consumer whether he takes any service or not. These are the so-called consumer costs.

"*Second*, inasmuch as the consumer has the right to take energy for lighting or power at any time he pleases, without warning, simply by closing a switch, the company must maintain lines and generating capacity; must keep voltage or pressure on the consumers' lines, and be all ready to give him service whether he closes his switch and takes service or not. This is the so-called demand cost, or readiness to serve charge, and its magnitude for any given consumer depends somewhat upon its maximum demand.

"*Third*, if the consumer takes energy for lighting or power, the company is put to further expense. In a steam plant, it must burn more coal. It must always use more oil, put in larger conductors, have greater loss, etc. The cost of the energy is more or less in direct relation to the amount of energy used.

"In many cases the total rate for service is expressed by three separate and distinct rates corresponding to each of the above

costs. This is called a three-charge rate. It should not be inferred that this rate is always a carefully calculated rate from accurately allocated expenses. First of all, it is difficult to make a satisfactory allocation of the total expense of service into these three divisions. Second, even if it were possible to obtain accuracy, various commercial conditions, especially if the company has a history of rate making, prevent a strict adherence to the calculated quantities.

"Frequently the expression of the rate is 'simplified' by combining in a variety of ways these three rates to form two rates. The rate itself is not necessarily changed a particle, merely its expression. The expression is changed merely because commercially it may be more attractive to the consumer. As a matter of fact, the simplification is only apparent because the simplest rate is the three-charge rate. The latter undoubtedly looks more complex. Frequently, for certain classes of service, a further 'simplification' is introduced by various forms of block energy rates. In this case the demand and customer charge do not specifically appear, but are introduced by making the first block of energy cost more than succeeding blocks.

"It is important to note that all these different expressions do not necessarily change the rate itself.

"*The Inducing Feature:* The object of every business man having any investment on which he must earn a return is to make use of that investment to the greatest extent possible. It is only by doing this that the greatest profit can come to the merchant and the greatest benefit to his customers. In other words, greatest profit and lowest rates. Any rate, therefore, which does not induce the greatest use of the power house capacity is not economically correct and should be adjusted. A proper rate will always induce a customer to keep his maximum demand as low as possible, and to make use of his demand the greatest number of hours possible."

We think it might be well to mention at this time that when the company first made its application for permission to increase its rates there were many of its customers who paid nothing whatever

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in some months for the service which the company was rendering. Some were residence customers and some were power customers. A list was given showing the earnings during the month of April, 1912, from thirty customers having five-horsepower motors installed. The lowest amount paid by any of these customers was seventy-six cents, and the maximum nine dollars and fifteen cents. A similar list of 113 general lighting customers was submitted for the month of April, 1912, showing that a large number of them used no electricity at all, and the minimum bill rendered to any of them was eight cents and the maximum was seventy-four cents. Another list was submitted of 143 residence customers, some of whom used no electricity, and the minimum bill rendered to any of these customers was eight cents and the maximum was sixty-eight cents. A statement was also submitted showing the connected load and the amount of the bills for 41 power customers for the same month, the installed capacity of the motors ranging from one-half horse power to one hundred and five horse power, and some of these customers used no electricity during the month, while the minimum bill rendered to any of them was seventy-seven cents and the maximum bill was twelve dollars and sixty cents; and the charge for electricity to the customer having the one hundred and five horse power installation amounted to only twelve dollars. We think these illustrations speak for themselves and conclusively demonstrate the inequality of the rates which prevailed in Lockport prior to the revision which was approved by the Commission.

Before we leave this discussion of rates it may be of some interest to call attention to one of the tabulations which was used by Mr. Ballard to show the injustice of the present rates. The figures are shown on pages 13 to 18 inclusive of the city's exhibit No. 5. The purpose of this statement was to show the average rate paid by a customer for the electricity purchased by him for the months of July and December, and also to point out the great difference in such average rate as applied to the users of different quantities of electricity. According to these computations the customer who used six kilowatt hours in July and ten kilowatt

hours in December paid an average rate for the two months of fourteen and four-tenths cents per kilowatt hour; while the customer who used twenty-two kilowatt hours in July and forty-five kilowatt hours in December, for example, paid an average rate per kilowatt hour of six and eight-tenths cents. This is certainly an ingenious way of pointing out that a discrimination is caused by the present method of charging for electricity used by residence consumers, but it is not the proper way to analyze the present rates for the service, because he ignores the service charge completely, and the only criterion he used was the charge per kilowatt hour. In other words, he attempts to show that the service charge of seventy-five cents per month is really a charge for the electricity supplied, when such is not the fact, and is quite contrary to the principle upon which the present rates were established and authorized by the Commission. Standing by itself the figures presented by Mr. Ballard might readily seem to indicate a discrimination between the residence lighting customers of the Lockport Company to a person who was not familiar with all of the facts in this case, and we do not consider that they should be passed by without pointing out the other facts which should be considered in connection with them. In order to present the matter clearly and in accordance with the facts, these computations should show that the customer who uses six kilowatt hours in July pays a service charge of seventy-five cents and five cents per kilowatt hour for his electricity, and when he uses ten kilowatt hours in December he pays the same service charge and the same rate per kilowatt hour, and not an average rate of fourteen and four-tenths cents per kilowatt hour as Mr. Ballard attempts to demonstrate. In other words, what he pays for his electricity as such is the same no matter whether he uses one kilowatt hour per month or any other amount not exceeding thirty-five kilowatt hours per month, and after that the rate for his electricity is very substantially reduced.

A good deal appears in the record in regard to the prices at which power is sold by the company in large quantities. We do not think this requires much consideration or discussion. It is a

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well-known fact that in order to stimulate the use of electricity in large quantities the price must be low in order to compete with other methods of producing energy. We do not find that the company is selling electricity to large power users at an unreasonably low price. It is probably necessary for it to do this in order to conduct its business to the best advantage. Besides this, we believe that there are other conditions which have been imposed upon the company in times past which seem to require it to sell power at these low prices, and it has probably been for the best interest of the people in Lockport that this has been done as it has probably been a factor in developing the city industrially. We believe it is sufficient for us to say at this time that if at some future day it should satisfactorily appear that the company should and could increase the price now charged by it for power in large quantities it ought to and probably will take the necessary steps to increase that price. Whether this would be of any material benefit to the small consumer in Lockport we can not at this time attempt to determine.

During the progress of the case it appeared that the company did not treat all of its power consumers in the same way, particularly those whose rates were based upon a demand charge. The demand of some of these customers is determined by demand meters which are manufactured for that purpose. Other customers have not had such demand meters installed in their premises, but the representatives of the company have determined the demand by what they call the stop-watch method. The witnesses for the company stated that the amount used by some of these power consumers was not sufficient to justify it in going to the expense of installing demand meters and that it had also had great difficulty in getting such meters although they had been ordered for a long period of time. While the stop-watch method may be all right as a means of determining what the customer's demand is, yet we believe that if the company establishes a rate for power based on the demand, that it ought to treat all the users of power in that class alike. It is not the fault of the consumer if the company deems it best to establish such a rate, but he is

entitled to the same treatment as all other power users in his class. He is undoubtedly justified in claiming that there is an apparent discrimination against him if a demand meter is installed in his premises for the purpose of determining his demand, but no such meter is installed in the premises of his neighbor whose demand is determined by the stop-watch method. The company should therefore arrange to install demand meters in the premises of the power users whose rates are based on a demand charge so that all such customers may be treated alike so far as the determination of the demand is concerned. While it may be true that the amount of current used by some of these customers does not justify the installation of a meter, yet this is an element of cost which must be considered in making rates and will be given every consideration in due course.

For the purpose of ascertaining the proper amount upon which the company should be entitled to earn a return, we have prepared a summary of the various tabulations which have been discussed in this opinion, the table of tabulations on the following page.

This enables us to see what the fixed capital was at December 31, 1916, after allowing for depreciation, and what the total amounts would be including working capital, and deficiency of return at the sum claimed by the company, namely \$95,000; also what the totals would be if there were allowed for deficiency of return the amounts shown in F and H, which are \$96,485 and \$111,836 respectively. In considering this phase of the case we have concluded that the book figures in Tabulations A and F do not correctly represent the actual investment of the company as we have before shown, and that they properly ought not to be used as a basis for ascertaining upon what amount the company should be allowed to earn a return. We think the company's figures shown in Tabulation E should be eliminated from the present consideration, as we think they are too high in some respects as we have pointed out. We think that the proper totals to be used, so far as invested capital is concerned, are those representing the Crowell figures in Tabulation A, and those in B and D, the city's figures in E, and those in H based on the Crowell valuations.

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TABLE OF TABULATIONS

	(A)		(B)	(D)	(E)		(F)	(H)
	(Crowell)	(Bochs)			(Company)	(City)	(Bochs)	(Crowell)
December 31, 1916	\$44,854	\$48,564	\$511,586	\$513,900	\$576,785	\$581,544	\$441,481	\$472,714
Fixed capital.....	88,250	88,250	100,000	119,118	120,000	109,568	88,250	76,112
Depreciation (after allowing for withdrawals).....								
Working capital.....	\$391,604	\$356,314	\$411,586	\$394,782	\$456,785	\$421,746	\$358,231	\$396,602
	25,000	25,000	25,000	25,000	.....	.....	25,000	25,000
Total invested capital.....	\$416,604	\$381,304	\$436,586	\$419,782	\$456,785	\$421,746	\$383,231	\$421,602
Deficiency of return at.....	95,000	95,000	95,000	95,000	95,000	95,000	95,000	95,000
Total amount on which company is entitled to a return.....	\$511,604	\$476,304	\$531,586	\$514,782	\$551,785	\$516,746	\$478,231	\$516,602
or								
with deficiency of return placed at \$96,485.....	\$513,089	\$477,789	\$533,071	\$516,267	\$553,270	\$518,231	\$479,716	\$518,067
or								
with deficiency of return placed at \$111,836.....	\$628,440	\$493,140	\$548,422	\$531,618	\$568,621	\$533,583	\$496,067	\$533,438

* Includes working capital.

Disregarding entirely for the moment the amount to be allowed for deficiency of return, we see that the minimum amount in any of these last mentioned calculations is \$416,604 and the highest is \$436,586. The difference between them is slightly less than \$20,000. It might not be unreasonable to take either one of these amounts, but in order to be perfectly fair to all concerned we have considered that it would be proper to take the average of the total amounts in the five tabulations under consideration for the purpose of ascertaining what the total invested capital was as of December 31, 1916, after allowing for depreciation. We find that this amounts to \$423,264. It then remains for us to determine what amount should be allowed for deficiency of return. From the standpoint of the city's counsel and engineer no allowance should be made on this account. The company claimed, as we have stated, that it was entitled to an allowance of \$95,000 for this purpose in ascertaining what rates it might properly be permitted to charge. From the calculations made by our division of capitalization, based on the book figures of the company, we have seen that the actual deficiency of return on an 8 per cent basis as of December 31, 1916, is \$96,485, and on the basis of the Crowell figures it is \$111,836 as of the same date. In Tabulation F it appears that the surplus of the company for the year 1916, after allowing for depreciation and an 8 per cent return on the invested capital, was \$13,211, and on the basis of Tabulation H the surplus for the same period was \$11,660. This is without giving any consideration to the question of a return upon the deficiency which has accumulated during the years 1908 to 1916 inclusive. Inasmuch as the company now appears to be earning something more than 8 per cent on its investment it seems to us that we are justified in concluding that it is not entitled to earn a return upon a deficiency in excess of \$95,000 notwithstanding the accumulated deficiency is apparently somewhat larger. Upon this basis the company is entitled to a return upon its total invested capital plus a deficiency of return of \$95,000, or a total amount \$518,264. The results which will follow on the basis of the earnings of the company for the year 1916 are as follows:

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Fixed capital after allowing for depreciation.....	\$398,264
Working capital	25,000
<hr/>	
Total capital for computing return.....	\$423,264
Deficiency of return	95,000
<hr/>	
Total amount on which to base return.....	\$518,264
Gross revenue 1916.....	\$203,693
Operating expenses, including taxes (depreciation excluded)	139,985
<hr/>	
Net operating revenue	\$63,708
Return on capital and deficiency at 8 per cent....	\$41,461
Depreciation	12,231
<hr/>	
Necessary net revenue	53,692
<hr/>	
Surplus	\$10,016
<hr/>	

It may, and probably will, be claimed that the company ought not to be permitted to earn anything more than the return on this amount, and that it is not entitled to have anything left for a surplus after paying 8 per cent on \$518,264, but we have in mind that portion of the law relating to these matters which states that a corporation should be allowed not only to earn a reasonable average return upon the capital actually expended, but also something for surplus and contingencies. This is undoubtedly sound. If when a company has paid to its stockholders the amount which represents the return on their investment there is nothing left over, then there would be no accumulation in the treasury to enable the corporation to make extensions and additions to its property without increasing its capital or to provide for any unusual expense to which it might be subjected in the conduct of its business and which might perhaps not be a proper subject for capitalization. That there are such contingencies is well known to everyone who is at all familiar with public utilities like the Lockport Company. Then again there is the serious question of obsolescence, which we have not brought into the consideration of this case, and it is something which must always be borne in mind. While it is true that it may not be of so much moment at the

present time, due to the great improvements which have been made in recent years in the electrical industry, yet such improvements are going on from year to year, and the companies must be able to take advantage of those improvements if they are to keep abreast of the times and to give such service as the public requires and is entitled to expect if a fair and reasonable price is paid for that service. While the depreciation account takes care of some portion of obsolescence, yet depreciation, as we have figured it in the present case, does not take care of unusual items of obsolescence. We believe that it is better for the public to permit a company to earn a small surplus so that it may not be handicapped in keeping fully abreast of the times, and so that the public can successfully assert its claim that such improvements as are necessary and desirable should be promptly made and not permit the company to be placed in a position where it can plead that it is too poor to comply with such demands. If a condition of prosperity prevails with a corporation, there will be no necessity or justification for it to urge that it ought not to be required to make extensions and improvements which the public desires and is entitled to because such extensions and improvements will not earn a fair return on the investment. Extensions could be made upon which the return to the company might be nothing for a considerable period of time if considered entirely by themselves, but the fact that the total business of the company is prosperous even though some of the extensions asked for might be unprofitable, would warrant making them and would also justify a regulating body in ordering them to be made. In this way many people would have opportunity to get service who might otherwise be deprived of it if the company was able to demonstrate that it would be unable to earn anything on the additional investment required to give the desired service. The expectation is that when a corporation obtains a franchise from the public to enable it to give service in a community that it shall, so far as possible, give the entire community that service, provided it can be done and still give the company a fair return on its investment.

So we say that the Lockport Company and the public which it

serves is better off in every respect if it is able to earn an amount which will enable it to have a surplus available for some of the purposes we have indicated, and if the company continues to prosper the time may come when it will have succeeded in earning out the deficiency which has been accumulating in the past years; and if that time does come and the company has been able to give all of the service which may reasonably be required from it, then a situation will be presented where a reduction in its rates may very properly be required.

We can not speculate, however, as to the future, for none of us know what it may bring forth. As a matter of fact, we have not given any consideration to the operating expenses of the company for the year 1917 which we presume have increased considerably over 1916, the same as those of other companies engaged in business under substantially similar conditions as the Lockport Company, and it might be that the earnings of the corporation for 1917 will not show any substantial amount over and above an 8 per cent return on the capital invested plus the deficiency of return. It is also quite probable that the operating expenses for 1918 will be equal to if not higher than those for 1917, and this condition is likely to prevail until the world gets back to what we frequently term the normal conditions which prevailed prior to 1915.

Then again, if business conditions become depressed for any considerable period of time, the surplus which the company is able to build up may be of material assistance in enabling it to maintain the rate of return to its stockholders, inasmuch as it seems to be a well-established fact that property employed in the public service is entitled to a reasonable rate of return in bad times as well as when prosperity prevails. This is particularly true in recent years since corporations have been subject to regulation and their rates have been fixed with respect to the earnings which the company should be permitted to receive, and every effort is being made to see that rates to the public are fair and that the corporation shall, so far as possible, have only a fair return for the service which it renders the public. Then again, of course,

under regulation the companies are not permitted to earn exorbitant profits in the prosperous years which would aid them in providing for their necessities during the lean years.

In any event, the facts which have been developed in this case do not seem to justify a determination that the present rate schedule of the Lockport Company is either unfair, unreasonable, or inequitable, at least so far as the residence lighting customers and small power users are concerned, and we believe, and so determine, that there is no reason, so far as the record in this case discloses, why the rate schedule which was fixed by the order of the Commission on October 5, 1915, should be modified in any respect at this time, and the application of the Electric Consumers Protective Association, the Lockport Board of Commerce, and the City of Lockport for a revision of the existing rates of the Lockport Company should be denied; and an order to that effect entered in due course.

All concur except Emmet, Commissioner, absent; and Barhite, Commissioner, who votes in favor of the opinion except so far as it refers to the Thompson investigating committee or the action taken by that committee, as he does not consider it proper in a proceeding of this kind to consider that question or the action of that committee.

In the Matter of the Petition of WAVERLY, SAYRE AND ATHENS TRACTION COMPANY under Subdivision 1, Section 49, Public Service Commissions Law, for Permission to Increase Passenger Fares

Case No. 6099

(Public Service Commission, Second District, January 31, 1918)

Application for permission to increase passenger fares in an incorporated village.

Necessary adjustment of fares on interstate lines.

The petitioning company has no tracks and conducts no operations in the State of New York except in the village of Waverly. The only fares

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involved in this case are those to be charged in that village. The company owns trackage of less than eleven miles operated in three lines, one of which is known as the "loop," and is entirely within the village. Upon an examination of the operating revenues and operating expenses of the petitioner as set forth in the opinion herein it was held that the company was entitled to increase its rate of fare within the village of Waverly from five cents to six cents.

One of the lines of the company is located partly in New York State and partly in the State of Pennsylvania, and the cars on that line connect Waverly with Sayre in the latter State. There is thus an interstate operation involved. Some adjustment must be made on the interstate route because passengers riding solely within the State of New York cannot be charged six cents while passengers riding over the same line and transferring into Pennsylvania pay only five cents.

Thomas O'Connor, for the applicant.

IRVINE, Commissioner.— This is a petition under section 49 of the Public Service Commissions Law asking that the Commission determine that the rate to be received by the petitioner within the limits of cities and incorporated villages shall be six cents per passenger. This is one of a large group of cases of the same general character. The power of the Commission in the premises and its duties under the law were discussed in the matter of the petition of the Huntington Railroad Company, opinion No. 324. The applicant, Waverly, Sayre and Athens Traction Company, has no tracks and conducts no operations in the State of New York except in the village of Waverly, so fares within that village alone are involved in this case. The company's lines are a little less than eleven miles in extent. Three lines are operated. One operates wholly within the village of Waverly and forms what is commonly known as the "loop." Another starts at the business center of Waverly, on Broad street, and is operated eastward along that street on the same tracks used by the loop about 1,800 feet. It then turns southerly, almost immediately crosses the State line, and extends through Sayre, Penn., and into and through Athens. The third line starts at the same point in Waverly, goes westerly along Broad street on the same track occupied by the local line about 1,200 feet, then turns southerly and passes through South

Waverly and Sayre to a junction with the second line about at the business center of that community. The determination of this case is complicated by this interstate operation. The present rates are five cents on the loop, five cents from Waverly to South Waverly and to Sayre, and ten cents from Waverly to Athens. Transfers are given to and from the Loop line and between that line and the other two. A hearing was held in Albany December 31, 1917, at which no one appeared in opposition.

In support of its contention that its New York State line, that is to say, the line that has been styled the "loop," does not yield a sufficient return, the applicant offered evidence to show that its receipts within the State in the five months, July to November, 1917, inclusive, amounted to \$2,648.79. This includes \$983.54 received as rent from the Elmira, Corning and Waverly Railroad, and \$7.20 for freight. The company purchases power from the Sayre Electric Company, and on a car-mileage basis the power during the same time cost the applicant \$952.21. The platform expenses were \$1,211.76. This leaves a surplus of revenue over these two items of operating expense of \$484.82. In addition, it was proved that the price for power as fixed by contract between the Sayre company and the applicant slides with the price of coal, and that under prices so fixed for the year 1918 the power expense will be very materially increased. It has not been deemed proper to base a decision on this rather meagre information. Therefore the records on file with the Commission for the year 1916 have been examined, as reported by the company. The total number of five cent fares collected on the Loop line was 145,414. The total number of transfers collected on this route was 64,679. A very large part of the company's business consists in carrying passengers between their homes in Waverly and the Lehigh Valley shops in Sayre, so that while there is a transfer point between the two interstate lines in Sayre it may be assumed without detriment to the public and without serious injury to the applicant that the number of transfers so stated represents approximately the number of interstate passengers. This gives us as the number of intrastate passengers 80,735, or intrastate revenue at five cents \$4,036.75.

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Taking the company's evidence as to its passenger revenue for five months of 1917 (by deducting from the total revenue rentals and freight revenue), we find that this is equivalent to a yearly intrastate revenue of \$3,979.32. It is evident, therefore, that the previous assumptions were very close to the truth. The Loop line should properly be credited with its proportion of interstate revenues as disclosed by the transfers. In making this calculation it has been assumed that the average ride of interstate passengers is from Clinton avenue and Center street in Waverly, by Clinton avenue, Pine and Broad streets, into Pennsylvania, and as far as North Elmer avenue and Cayuga street in Sayre. The Sayre point is assumed to be about the central point for employees of the Lehigh Valley. The point taken in Waverly is about half way around the loop and probably represents a greater distance than the average traveled in Waverly.

The Interstate Revenues: In apportioning the interstate revenues as between the Loop line and the interstate lines it has seemed fair to calculate it by proportionate distances. The following result is reached:

Interstate revenue, 64,679 transfers at five cents, \$3,233.95.

Assumed average interstate ride: from Clinton avenue and Center street, Waverly, via Clinton, Pine, and Broad to North Elmer avenue and Cayuga street, Sayre, by map, 8,900 feet.

New York proportion of assumed average interstate ride, by map, 6,000 feet.

New York proportion of interstate revenue ($6000/8900 \times \$3,233.95$) \$2,179.68.

Total annual passenger revenue to be credited to Clinton avenue line (\$4,036.75 intrastate, \$2,179.68 New York proportion of interstate) on basis of 1916, \$6,216.43.

It will be remembered that the applicant proved only two items of operating expenses. In endeavoring to reach a fair estimate of the entire actual operating expenses, it has been assumed that the proportion of platform and power expenses to maintenance, general, and other expenses was the same for the loop as for the whole system. We reach these results:

Expenses Assignable to the Loop:

Annual cost of operating line on basis of testimony as to five months of 1917, 12/5 of \$952.21....	\$2,285 28
Annual platform expense, same basis, 12/5 of \$1,211.76	2,908 20
	<u>\$5,193 48</u>

Platform and power expenses entire line, as reported for 1916, were.....	40,373 65
Total operating expenses 1916 were.....	72,834 57
Assuming that proportion of platform and power expenses to maintenance, general, and other expenses was the same for Clinton avenue line (the Loop) as for the whole system, total expenses to be charged against that line would be (72835/40374 x \$5,193)	9,373 37

By this process of estimating the total intrastate revenues and expenses it appears that the Loop line in 1916 failed by a very considerable amount to meet its operating expenses —

Expenses	\$9,373 37
Passenger revenues	6,216 43
Deficit	<u>\$3,156 94</u>

It does not necessarily follow from this calculation that the company is entitled to increase its fare beyond the five cents fixed by section 181 of the Railroad Law. In order to reach any conclusion we must examine the entire operations of the corporation and for a series of years. The following shows the income account for the years stated:

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INCOME ACCOUNT FOR EACH FISCAL YEAR ENDED JUNE 30, 1910, TO JUNE 30, 1917, INCLUSIVE

Item	1910	1911	1912	1913	1914	1915	1916	1917
Operating revenues, railroad.....	\$77,215	\$84,160	\$90,640	\$95,467	\$98,193	\$93,760	\$99,658	\$101,007
Operating expenses, railroad.....	59,214	61,422	68,197	67,953	73,140	73,879	70,642	76,902
Net operating revenues.....	\$18,000	\$22,738	\$22,442	\$27,513	\$25,052	\$19,880	\$29,016	\$24,045
Taxes accrued.....	2,081	2,450	2,621	2,683	2,822	3,210	3,876	3,900
Operating income, railroad.....	\$15,921	\$20,288	\$19,821	\$24,830	\$22,230	\$16,670	\$25,140	\$20,445
Total operating income.....	\$15,921	\$20,288	\$19,821	\$24,830	\$22,230	\$16,670	\$25,140	\$20,445
Non-operating income.....	.....	.....	.....	.....	.....	.....	.....	.....
Non-operating revenue deductions.....	.....	.....	.....	.....	.....	.....	.....	.....
Gross income.....	\$15,921	\$20,288	\$19,821	\$24,830	\$22,230	\$16,670	\$25,140	\$20,445
Gross income deductions:								
Interest accrued on funded debt.....	\$12,300	\$12,300	\$12,300	\$12,800	\$13,300	\$15,250	\$15,250	\$18,710
Other interest accrued.....	2,902	2,909	2,986	4,446	1,440	1,828	1,273	1,127
Amortization charged to income.....	.....	100	100	100	180	270	300	150
Total deductions from gross income.....	\$15,202	\$14,909	\$15,386	\$17,346	\$14,920	\$17,349	\$16,823	\$19,987
Net corporate income.....	\$719	\$5,319	\$4,435	\$7,484	\$7,310	\$979	\$8,317	\$458
Surplus or deficit previous year.....	31,838	32,555	33,657	35,115	42,599	49,909	49,230	57,547
Miscellaneous debits.....	.....	4,218	2,977	.....	.....	.....	.....	.....
Surplus or deficit June 30th.....	\$32,555	\$33,657	\$35,115	\$42,599	\$49,909	\$49,230	\$57,547	\$58,005

Figures in *italics* denote deduction or deficit.

This indicates a surplus in the operation of each year except 1915. However, we find an unusual state of affairs in respect to interest on funded debt. The president of the company owns all the stock except six shares, apparently held as qualifying shares. The company has outstanding bonds to the par value of \$460,000. A considerable amount of these bonds is owned by the president of the company, who has each year surrendered to the company and canceled the interest coupons. No dividends have been paid during the period covered by the above tables. Correcting the gross income deductions by adding thereto the amount of coupons each year so surrendered we reach the following result:

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CORRECTED GROSS INCOME DEDUCTIONS

Item	1910	1911	1912	1913	1914	1915	1916	1917
Gross income.....	\$15,921	\$20,288	\$19,821	\$24,830	\$25,230	\$16,670	\$25,140	\$20,445
Interest accrued on funded debt, paid.....	\$12,300	\$12,300	\$12,300	\$12,800	\$13,300	\$15,250	\$15,250	\$18,710
Interest accrued on funded debt, unpaid.....	6,700	8,200	9,200	8,700	10,600	9,150	9,250	5,790
Other interest accrued.....	2,902	2,589	2,988	4,464	1,440	1,828	1,273	1,127
Amortization charged to income.....	.....	100	100	100	180	270	300	150
Total deductions from gross income.....	\$21,902	\$23,189	\$24,588	\$26,064	\$25,520	\$26,499	\$26,073	\$25,777
Net corporate income.....	\$5,981	\$7,097	\$5,286	\$8,024	\$9,710	\$9,869	\$9,869	\$1,735
Surplus or deficit previous year.....	31,855	25,855	18,756	11,014	9,780	6,490	3,339	4,272
Miscellaneous debits.....	.....	4,818	2,677	.....	.....	.....	.....	.....
Surplus or deficit.....	\$25,855	\$18,756	\$11,014	\$9,780	\$9,490	\$3,339	\$4,272	\$9,004

Figures in *italics* denote deduction or deficit.

No valuation of the road has been made nor does it seem necessary. As stated, the company owns almost eleven miles of track with the accompanying overhead structures. There are six steel bridges of an aggregate length of 664 feet. A considerable portion, $3\frac{54}{100}$ miles, is on paved streets. The company owns and uses twenty-three cars. It requires no very great familiarity with the cost of such systems to justify the inference that the property used in the public service is worth the amount of the outstanding bonds. The owners of stock and bonds are not required to go without dividends or interest in these circumstances.

While the evidence relating to the New York State property and operations taken in connection with the general situation of the road exhibits a state of affairs demanding that the relief asked for be granted, the company is advised that, while the New York State operation is probably the least remunerative, it is closely interlinked with the interstate operation, and that the company should consider carefully the wisdom and necessity of asking that its other patrons share the burden. In fact, some adjustment must be made, because passengers riding solely in the State of New York cannot be charged six cents while passengers riding over the same line and transferring into Pennsylvania pay only five cents.

Chairman Van Santvoord and Commissioners Carr and Barhite concur; Commissioner Emmet not present.

In the Matter of the Complaint of ZEVELIA P. COBURN of New York City against POSTAL TELEGRAPH CABLE COMPANY, as to Refunding of Money Transferred

Case No. 6145

(Public Service Commission, Second District, February 26, 1918)

Reasonable time within which a telegraph company should refund a money order when the payee can not be located.

The complaint herein is based upon the allegation that on May 7, 1914, the complainant sent to her brother by the lines of the respondent a

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money order for fifty dollars from New York City to Jacksonville, Fla. The respondent being unable to locate the payee notified the complainant on May 12, 1914, to call at its New York office for her money. Before she did so, however, the money had been paid to the payee at the New York office. The complainant now demands the refunding by the respondent of her money. *Held*, that the Commission has no authority in this particular transaction as it was an interstate matter and that the only feature that could be considered was whether a similar practice relative to intrastate money transfers was reasonable or otherwise. Also that the telegraph company must have a reasonable time to locate the payee and must not hold the money for an unreasonable time where it is unable to locate him. Seventy-two hours is such reasonable time, but the company should not be prevented from serving both payer and payee by being required to discontinue its effort within such limit of time. This has been the general rule and has given public satisfaction for many years, and a single case of individual dissatisfaction does not give sufficient ground for warranting an order to change the practice. Case dismissed.

BY THE COMMISSION.—On May 7, 1914, that is, three years prior to the filing of this complaint, the complainant transmitted to her brother by the lines of the respondent a money order for fifty dollars, from New York city to Jacksonville, Fla.

The respondent being unable to locate the payee at the address given sent notice to the complainant on May 12, 1914, to call at its office for refund of the money. There was some delay on the part of the complainant in complying with this notice, and in the meantime the payee appeared at the company's office in New York and upon being identified was given the money.

The complainant asked that the Commission enter an order, *first*, to require the company to refund the money to her, and *second*, that, in effect, the respondent be bound strictly to make such refunds within seventy-two hours in the event that the payees of money orders are not located within that time, claiming that such practice is required as a protection to the public and is a reasonable interpretation of the company's rule which reads as follows: "In case payment is not made to the payee within seventy-two hours after receipt of the transfer message by the manager of the paying office (exclusive of Sundays and holidays) the transfer will be cancelled and the amount thereof refunded to the sender on application at the receiving office."

At the hearing of this case the commissioner presiding neces-

sarily ruled that this particular transaction was an interstate matter and therefore outside the jurisdiction of this Commission, and that the only feature that could be considered was whether a similar practice relative to intrastate money transfers was reasonable or otherwise.

In transmitting money by telegraph the company must have a reasonable time to locate the payee and, on the other hand, must not hold the money for an unreasonable time in the event that it is unable to locate the payee. Under its rule the respondent holds itself responsible for continuing its effort to locate the payee for seventy-two hours after accepting the order. Such a time limit does not appear to be unreasonable, but if the company should so elect, it should not be prevented from further serving the interests of both payer and payee by being required to discontinue its effort within exactly seventy-two hours.

No theory of general application was advanced by the complainant to show in what respect the public suffers because of the present practice. There is no question of loss or misappropriation of funds involved, and there appears to be no unwillingness to do less than may be reasonably required. The rule has been in effect for many years and has not before been the subject of formal complaint or even of informal inquiry.

The reasons why the complainant desired at one time that payment be made and sometime thereafter wished the payment withheld appear to have been personal and unusual, and not such as would apply to the general public. The fact that a practice of the respondent which, so far as the Commission is aware, has given general satisfaction for many years did not work out to the satisfaction of this complainant in one instance under some peculiar circumstances, does not give sufficient ground for warranting an order to change the practice; therefore it is

Ordered: That this case be and is hereby dismissed and closed upon the records of this Commission.

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In the Matter of the Petition (Complaint) of ADDISON GAS AND POWER COMPANY under sections 71 and 72, Public Service Commissions Law, Asking that Said Company May Be Allowed to Increase Its Rate for Natural Gas

Case No. 6281

(Public Service Commission, Second District, February 28, 1918)

The rate-regulating powers of the Commission cannot be superseded by a local franchise increasing existing rates.

Two corporations, one of which is of Pennsylvania, cannot by agreement enter upon an arrangement as to price regulations.

This application is made by the Addison Gas and Power Company to the Commission for the approval of its amended franchise from the village of Addison authorizing an increase in its rates for natural gas. The petitioner obtained its gas by purchase from a Pennsylvania producing corporation with which it had an arrangement by which the Pennsylvania corporation received in payment for gas furnished two-thirds of the price charged by the petitioner to its consumers. The Pennsylvania corporation sought to compel an increase in rates to consumers in order to obtain a higher price under this arrangement.

Held, that the rate by franchise, if it had any effect, did not supersede the rate-regulating powers of the Commission and that the petition should be treated as one under sections 71 and 72 for an order fixing the price of gas, as it contained all the necessary averments of such a petition. Also *held*, that the Commission could not recognize the right of the two corporations by such an arrangement to regulate prices to consumers; it could not compel the Pennsylvania corporation to continue to supply the gas at wholesale to the local company. The question being presented what, if any, relief the petitioner should have in order to enable it to pay the increased price demanded by the producing company, *held*, also, that upon an examination of the operations of the company it was entitled to increase its price from 40 cents net to 48 cents net, it being calculated that this would yield, under present conditions, a return of about 8.6 per cent on the value of the property used in the public service, and that this return is, under the circumstances, reasonable.

Delmar M. Darrin and Michael H. Danaher, for petitioner.

C. L. Crane, for the Village of Addison.

E. C. Smith, for himself as a consumer and taxpayer, in opposition.

IRVINE, Commissioner.— This application is in form for the approval of an amendment of a franchise granted by the village of Addison to the applicant. The only amendment to the franchise is permission to raise the rate for natural gas from forty-five cents a thousand feet, with five cents discount for payment on or before the eighteenth of the month, to fifty-five cents with a similar discount. Under the decision in *People ex rel. N. Y. & N. S. T. Co. v. Pub. Serv. Comm.*, 175 App. Div. 869, the Commission must hold that the village was without authority to regulate by franchise the price to be charged consumers; or at the most, that any authority it has in the premises is subject to the rate-regulating powers of this Commission. Therefore the application was treated as one under sections 71 and 72 of the Public Service Commissions Law as its averments contained everything necessary in such an application.

The plant of the applicant, the Addison Gas and Power Company, was constructed during the years 1903 and 1904. It apparently has continuously purchased its gas from the Potter Gas Company, a Pennsylvania corporation, whose field of production is in the State of Pennsylvania, and which has a transmission line along the northern part of that State and reaches Addison, Corning, and Elmira by diverging short lines of pipe. The reason stated for the proper increase is that the Potter Gas Company has increased its price of gas to the Addison Company. It appears clearly enough, although the evidence is in a confusing form, that the price paid by the Addison Company to the Potter Company per 1,000 feet is two-thirds of the price received per 1,000 feet by the Addison Company from its consumers, so that, in effect, the Potter Company, which is now demanding that the Addison Company make the increase, is asking that it receive thirty-three and three-tenths cents per 1,000 feet instead of twenty-six and seven-tenths cents. There is an apparent discrepancy on this two-thirds and one-third basis between the amounts received by the Addison Company from its consumers and the amount paid to the Potter Company. This is because the Potter Company receives payment for all gas supplied

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by it, and the Addison Company must therefore sustain all loss occasioned by leakage and similar causes.

The Commission cannot, of course, recognize the power of the two gas companies to fix the rates charged to consumers by the Addison Company by means of a contract for payment to the Potter Company of a percentage of the rate charged in Addison. Assuming that the Commission might regulate the rate to be charged by the Potter Company to the Addison Company, it is quite clear that it could not compel the Potter Company, a Pennsylvania corporation, producing in Pennsylvania, to continue to supply gas at wholesale to the local company. There seems to be no other practicable supply of natural gas for Addison, and it is better for the people of Addison to pay more for their gas than to have no gas. This is the alternative presented by the Potter Company. It therefore devolves upon the Commission to ascertain what, if any, relief the Addison Company is entitled to under the circumstances.

The opponents of the application and the company agreed that the actual investment by the Addison Company in its plant is approximately \$20,000. The experts of the Commission deem this a fair appraisalment. This sum, however, represents little more than the bare bones of the property. Something must be added for organization, administration, engineering, and interest during construction. The plant is small and the period of construction must have been very short. Without any evidence as to these costs it does not seem proper to allow more than 10 per cent therefor. There is no evidence upon which to base a finding as to development costs. In 1906 there was a deficit in income of \$1,765.70, but there appears an item of miscellaneous expense in that year of \$4,954.50, which is many times higher than the similar item for any subsequent year, and \$4,850 thereof is attributed to expense for damages awarded with no evidence as to their nature. Since then the plant has consistently paid interest on its bonds and dividends on its stock. The bonds, paying 6 per cent, amount to \$15,000, and are held by members of two families and chiefly by one man in each family. The stock amounts to \$50,000 par value. From the foregoing statements it will be seen that

there is behind the stock only about \$5,000 of cost of physical property and not much of other value. The rate of dividends for the past few years has been about 3 per cent on \$50,000. To summarize the operations of the company without going into elaborate details, we fix the cost of the plant and its value as follows:

Labor and material cost.....	\$20,000 00
General and overhead items.....	2,000 00
Materials and supplies, etc.....	500 00
<hr/>	
Total cost of physical property.....	\$22,500 00
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In 1916 the income account, summarized, appears as follows:

Operating revenue	\$14,699 20
Paid for gas.....	\$10,513 00
Salaries, taxes, etc.....	1,899 60
Depreciation (estimated)	660 00
<hr/>	
	13,072 60
<hr/>	
Income.....	\$1,626 60
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equals 7.2 per cent on cost (\$22,500) of physical property.

Assuming that the petition is granted in its entirety, the following would be the statement of estimated revenue:

Operating revenue	\$18,374 00
Paid for gas.....	\$13,141 00
Salaries, taxes, etc.....	1,899 60
Depreciation.	660 00
<hr/>	
	15,700 60
<hr/>	
Income.....	\$2,673 40
<hr/>	

equals 11.8 per cent on cost of physical property.

Assuming that rates remain the same, this would be the statement:

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Operating revenue	\$14,599 20
Paid for gas.....	\$13,141 00
Salaries, taxes, etc.....	1,899 60
Depreciation.	660 00
	<hr/>
	15,700 60
	<hr/>
Deficit.	<u><u>\$1,101 40</u></u>

Assuming that forty-eight cents a thousand feet be fixed as the price, the following would be the result:

Operating revenue at 48c.....	\$17,639 04
Deductions as in last table.....	15,700 60
	<hr/>
Income	<u><u>\$1,938 44</u></u>

equals 8.6 per cent on physical property.

These calculations have been made from the reports of the company for 1916. At the time of the hearing there was some evidence as to the operations of the company in 1917, but it was not complete. It was, however, sufficient to show that there had been no material change. To permit the entire increase asked would unduly enhance the profits of the company. To deny any relief would produce a deficit. To allow exactly the increase required to meet the increase in the cost of the gas purchased would give a rate of forty-six and seven-tenths cents, too awkward for practical purposes. If forty-eight cents be allowed and consumption remains the same, there would apparently be yielded a return equal to 8.6 per cent on the value of the property. This is not inordinate in itself, and permits a small margin to cover any possible undervaluation of the property. The item of \$660 per annum for a depreciation reserve is necessary for the protection of the rights of the public by properly protecting the property of the company. It must be actually set up and carried as a real reserve for the purpose indicated.

All concur.

In the Matter of the Application of ROCHESTER RAILWAY AND LIGHT COMPANY under Section 69, Public Service Commissions Law, for Authority to Issue \$4,000,000 in Preferred Capital Stock

Case No. 6285

(Public Service Commission, Second District, March 12, 1918)

Petition for leave to issue additional preferred capital stock of the Rochester Railway and Light Company.

The petition herein was filed December 11, 1917, and in the following February a hearing was held thereon and the matter referred to the division of capitalization. The report of that division under date of March 1, 1918, was in favor of granting the petition. The Commission accordingly granted to the petitioning company the right to issue \$2,000,000 par value of its 7 per cent cumulative preferred capital stock, series B, to be sold at not less than par, so as to realize net proceeds of at least that amount, the proceeds of this sale to be applied exclusively toward the discharge of indebtedness outstanding December 31, 1916. The permission granted is given with the usual restrictions.

Petition filed December 11, 1917.

Hearing held February 23, 1918.

Report of division of capitalization dated March 1, 1918.

BY THE COMMISSION.— Now, therefore, upon the foregoing record, ordered as follows:

1. That the Rochester Railway and Light Company is hereby authorized to issue \$2,000,000 par value of its 7 per cent cumulative preferred capital stock, series B, which may be sold at a price not less than the par value thereof to realize net proceeds of at least that amount.

2. That the proceeds of said stock, which shall not be less than \$2,000,000, shall be applied solely and exclusively toward the discharge of indebtedness outstanding at December 31, 1916, as detailed on page 5 of Exhibit A attached to the petition herein, or their renewals, \$3,535,000.

3. That the Rochester Railway and Light Company shall for

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each six months' period ending June thirtieth and December thirty-first file not more than thirty days from the end of such period a verified report which shall show:

(a) What stock has been sold during such period.

(b) The date of such sale.

(c) To whom such stock was sold.

(d) What proceeds were realized.

(e) Any other terms and conditions of such sale.

(f) In detail the amount expended during such period of the proceeds of the stock herein authorized for the purpose specified herein.

Such reports shall continue to be filed until all of said stock shall have been sold or disposed of and the proceeds expended in accordance with the authority contained herein, and if during any period no stock was sold or disposed of or proceeds expended, the report shall set forth such fact.

4. That this proceeding is hereby continued upon the records of the Commission until the examination which is now being made of the books, accounts and property of the petitioner herein shall have been concluded and the corrections, if any, which by reason of such examination this Commission shall determine to be proper and necessary shall have been made, accepted by the corporation and entered in the accounts of said company to the satisfaction of the Commission; and this order is expressly conditioned upon acceptance by the corporation of any such determination by the Commission and compliance with any subsequent direction or order of the Commission in the premises.

5. That the authority contained in this order to issue stock is upon the express condition that the petitioner accepts and agrees to comply in good faith with the provisions hereof and before any stock is issued pursuant hereto and within thirty days of the service hereof, the said company shall file with the Commission a satisfactory verified stipulation over the signatures of its president and secretary accepting this order with all its terms and conditions, and such order shall be void and of no force or effect until such stipulation shall have been filed as last above provided.

Finally, it is determined and stated, that in the opinion of the Commission the money to be procured by the issue of said stock herein authorized is reasonably required for the purpose specified in this order and that such purpose is not in whole or in part reasonably chargeable to operating expenses or to income.

In the Matter of the Petition of the LOCKPORT LIGHT, HEAT AND POWER COMPANY under Sections 69 and 82 and 70 and 83, Public Service Commissions Law, for Authority to Issue \$150,000 in Common Capital Stock Proposed to be Acquired by the United Gas & Electric Company (of New Jersey)

Case No. 6288

(Public Service Commission, Second District, March 12, 1918)

Application of a light, heat and power company for authority to issue \$150,000 in common capital stock, to be acquired by another corporation.

The petition herein was filed December 15, 1917, and nine days later an amended petition was filed. The application was referred to the division of capitalization, which made reports thereon on January 10 and February 26, 1918, and upon said reports the application was granted, the petitioning company, the Lockport Light, Heat and Power Company, being authorized to issue \$106,700 par value of its common capital stock, to be sold at a price not less than par so as to realize net proceeds of at least that amount, the proceeds of such stock to be used exclusively for the discharge of indebtedness outstanding at October 31, 1917. The authority granted is given subject to the usual restrictions.

Petition filed December 15, 1917.

Amended petition filed December 24, 1917.

Reports of division of capitalization dated January 10 and February 26, 1918.

BY THE COMMISSION.—Now, therefore, upon the foregoing record, ordered as follows:

1. That the proposed journal entries contained in the final

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report of the division of capitalization in this proceeding, dated February 26, 1918, which on February 28, 1918, was sent to the corporation, such entries being listed on pages 14 and 15 thereof, shall be entered upon the books of the Lockport Light, Heat and Power Company, and that within thirty days of the service of this order verified proof that such entries have been made shall be submitted to the Commission.

2. That the Lockport Light, Heat and Power Company is hereby authorized to issue \$106,700 par value of its common capital stock which may be sold at a price not less than the par value thereof to realize net proceeds of at least that amount.

3. That the proceeds of said stock, which shall not be less than..... \$106,700 00 shall be used solely and exclusively for the discharge of indebtedness outstanding at October 31, 1917, as follows, or the renewals thereof:

Bills payable	\$56,758 25	
Accounts payable	50,000 00	
		<u>106,758 25</u>

Amount unprovided for	\$58 25
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4. That the Lockport Light, Heat and Power Company shall for each six months' period ending June thirtieth and December thirty-first file not more than thirty days from the end of such period a verified report which shall show:

(a) What stock has been sold during such period.

(b) The date of such sale.

(c) To whom such stock was sold.

(d) What proceeds were realized from such sale.

(e) Any other terms and conditions of such sale.

(f) In detail the amount expended during such period of the proceeds of the stock herein authorized for each of the purposes specified herein.

Such reports shall continue to be filed until all of said stock shall have been sold or disposed of and the proceeds expended in

accordance with the authority contained herein, and if during any period no stock was sold or disposed of or proceeds expended, the report shall set forth such fact.

5. That the amortization program ordered by the Commission in its order dated December 10, 1913, in Case 2548 shall be followed for the \$26,224.41 which is to be charged to "unamortized depreciation suspense" in accordance with journal entry No. 6 shown on page 15 of the final report herein dated February 26, 1918, and the duration of the period during which said amortization plan is to be operative is hereby continued until this additional amount shall have been written off.

6. That the authority contained in this order to issue stock is upon the express condition that the petitioner accepts and agrees to comply in good faith with the provisions hereof and before any stock is issued pursuant hereto and within thirty days of the service hereof, the said company shall file with the Commission a satisfactory verified stipulation over the signature of its president and secretary accepting this order with all its terms and conditions, and such order shall be void and of no force or effect until such stipulation shall have been filed as last above provided.

7. It is nevertheless expressly provided that in all respects other than as directed in clause No. 1 hereof this order shall not be effective, and particularly that no stock shall be issued or sold hereunder by the applicant, nor shall the issue or sale of any such stock be deemed to have been approved and authorized by this Commission unless and until compliance with the requirements of said clause shall have been made, reported to and approved as sufficient by this Commission.

Finally, it is determined and stated, that in the opinion of the Commission the money to be procured by the issue of said stock herein authorized is reasonably required for the purposes specified in this order and that such purposes are not in whole or in part reasonably chargeable to operating expenses or to income.

In the Matter of the Complaint of C. C. AHLES, of Catskill, against THE NEW YORK CENTRAL RAILROAD COMPANY, Asking That the Price of Commutation Passenger Tickets on the West Shore Railroad, Lessor, Between Catskill and Albany be Reduced

Case No. 6298

(Public Service Commission, Second District, March 12, 1918)

Petition for the readjustment of commutation rates of the New York Central Railroad Company (West Shore Railroad) between Catskill and Albany.

Originally the complainant sought to have the commutation rates of the said railroad between Catskill and Albany reduced to those prevailing upon the same line (West Shore Railroad) between New York and Haverstraw. To do this, however, would mean a general readjustment of commutation rates throughout the State, placing them upon the same basis as the rates in New York city territory. Subsequently the complainant expressed himself as merely wishing to secure the extension of the time limit to two months instead of thirty days, during which the present fifty-four-trip ticket may be used, and he also contended that the Catskill-Albany rate was unjustly discriminatory. *Held*, that the proof showing that the respondent issues a fifty-four-trip ticket good for thirty days the ordinary demands of business travelers are met thereby; that no carrier within the State issues a commutation ticket good for more than one month except the Delaware and Hudson Company within certain districts; that these are issued at an average rate of one cent per mile while the Catskill commuters pay eighty-five one-hundredths of a cent per mile. The peculiar conditions justifying extremely low rates to relieve congestion in large cities do not apply to cases like Catskill, where there are only four commuters who ride on regular trains. Also *held*, that the tariffs here involved are in accordance with the long established tariffs of the respondent and other carriers and disclose no unjust discrimination, and that their disturbance would require a general readjustment of commutation tariffs in order to avoid creating unjust discrimination. Ordered that the complaint be and the same is hereby dismissed.

BY THE COMMISSION.—The complainant originally asked that the commutation rates of the respondent between Catskill and Albany be reduced to those prevailing upon the same line (West Shore railroad) between New York and Haverstraw. This would mean a general readjustment of commutation rates throughout

the State, placing them upon the same basis as the rates in New York city territory. The complainant afterwards stated that he would be satisfied if the time limit were extended to two months instead of the thirty days during which the present fifty-four-trip ticket may be used and he also contended that the Catskill-Albany rate was unjustly discriminatory. The whole matter has received a painstaking and thorough examination by the division of tariffs. The rate charged, fourteen dollars and seventy cents, is in accord with the schedule of commutation ticket rates in effect before the Public Service Commissions Law was enacted. These rates were constructed upon the basis of three dollars for a sixty-trip ticket between points three miles apart, an additional rate of ten-twelfths of a cent per mile for distances over three miles and not over seven miles and additional rates of nine-twelfths, eight-twelfths and seven-twelfths of a cent per mile for greater distances. The sixty-trip ticket must be used generally on Sundays and holidays in order to obtain its full benefit. The respondent issues a fifty-four trip ticket good for thirty days and this satisfies the ordinary demand of business travelers. No carrier within the State issues a commutation ticket good for more than one month except the Delaware and Hudson Company within certain districts. These are issued at an average rate of one cent per mile while the Catskill commuters pay eighty-five-one hundredths of a cent per mile. It is not found that any more favorable rates exist than those afforded the complainant except in and out of New York city and other large centres of population and business. Conditions are so dissimilar between this case and that of New York city, for example, that one rate cannot be taken as any measure of the other. Thousands of commuters traveling daily on trains run expressly for that business afford no comparison with the case of Catskill where there are only four commuters who ride on regular trains. The peculiar conditions justifying extremely low rates to relieve congestion in the large cities have been recognized in other cases by this Commission and others. The tariffs here involved being in accordance with the long established tariffs of the respondent and other carriers.

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disclosing no unjust discrimination and their disturbance requiring a general readjustment of commutation tariffs in order to avoid creating unjust discriminations, it is

Ordered, That the complaint be and the same hereby is dismissed.

In the Matter of the Petition of THE NEW YORK CENTRAL RAILROAD COMPANY under Section 54 of the Railroad Law for Consent to the Discontinuance of the Pulvers Station on the Hudson and Chatham Branch of the Boston and Albany Railroad, Lessor

Case No. 6309

(Public Service Commission, Second District, March 12, 1918)

Application for the discontinuance of an existing station on the Hudson and Chatham branch of the Boston and Albany Railroad, leased by the New York Central Railroad Company.

The attorney for the railroad, at the hearing in this matter, explained that the company desired to make the station in question, which is at Pulvers on the Hudson and Chatham branch of the Boston and Albany railroad, a flag station for passengers, and to discontinue the delivery and reception of freight in less than car-load lots, billing to be handled at Mellonville, a little over two miles away, or at Ghent, a little over three and one-half miles away. The company desires to do away with the services of the agent at Pulvers. Four passenger trains and one freight train pass Pulvers station each way on week days. Two passenger trains each day make regular stops; the other are flag stops. From the showing as to tickets sold during the year and commutation tickets sold and the amount of freight shipped, *held*, that Pulvers was of sufficient importance to require the services of an agent, and that the station is a source of profit to the railroad company. Petition denied.

BARHITE, Commissioner.—This is an application by the New York Central Railroad Company for consent to the discontinuance of Pulvers station on the Hudson and Chatham branch of the Boston and Albany Railroad, lessor. An agent is now kept at this station. At the hearing the attorney for the railroad stated that the company desires to make the station so far as passengers are

concerned a flag stop, and to discontinue the delivery and reception of freight in less than carload lots, the billing to be handled at Mellenville, a station two and seventeen one-hundredths miles away, or at Ghent, three and sixty-nine one-hundredths miles away. The company desires to do away with the services of the agent. Four passenger trains and one freight train pass Pulvers station each way on week days. Two passenger trains each day make regular stops; the others are flag stops. The number of single-trip tickets sold to Pulvers as a destination during the year 1917 was 1,635; and in addition, twenty-nine twenty-five-ride tickets were sold. There were during the same time 1,927 tickets sold out of Pulvers, in addition to thirteen forty-six-ride pupil tickets. The total revenue, passenger and freight, as estimated by the railroad company, was \$2,600; as given by the petitioners, \$2,687.34. The cost of running the station was in wages of agent \$691.60, in addition to repairs, the cost not given; and I presume the amount paid for coal.

Sixty-eight carloads of freight were shipped from the station during the year 1917. The amount of less than carload freight was not large. The amount of freight shipped to the station was not given. It would seem that Pulvers is of sufficient importance to require the services of an agent to care for the safety and convenience of passengers; to keep the station heated when necessary; in winter time to keep the walks to and from the station in passable condition; to receive orders for freight cars; to protect their contents while in process of loading; to ship and receive freight in whatever quantities it may be offered; to attend to the billing of the freight; and to perform such other duties as are usually performed by an agent at small stations in the country.

The station is a source of profit to the railroad company, and the amount of the income over and above the expense of maintenance, including the salary of an agent, constitutes a very substantial sum considering the location of the station.

Petition denied.

All concur.

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Petition of FRONTIER ELECTRIC RAILWAY COMPANY as to its
Railway Proposed to be Constructed in and between Buffalo
and Niagara Falls Crossing Certain Streets and Highways and
Creeks; also as to Certain Franchises

Case No. 5673

(Public Service Commission, Second District, March 19, 1918)

Vacating a suspension order in reference to the Frontier Electric Railway Company.

On October 17, 1916, an order was made by the Commission on the petition of the Frontier Electric Railway Company, but on March 20, 1917, the said order was suspended upon it being brought out in other proceedings that the said railroad was to be also operated as a steam railroad. The matter having been further considered by the Commission the suspension order of March 20, 1917, was vacated and the order of the previous year modified in relation to crossings at certain streets in the city of North Tonawanda.

BY THE COMMISSION.—In the matter above entitled the original order of October 17, 1916, was suspended March 20, 1917, on its LaSalle, N. Y., said International Railway Company and Frontier Electric Railroad was to be also operated as a steam railroad. After further consideration the Commission has determined to vacate its said suspension order of March 20, 1917, and to modify its order of October 17, 1916, by changing the paragraph under the caption "City of North Tonawanda," as it appears on pages 1 and 2 of said order as printed; and therefore it is

Ordered: 1. That with reference to the crossings in the city of North Tonawanda the Commission's order of October 17, 1916, is hereby changed and amended to read as follows:

"City of North Tonawanda: Over Sweeney street by an overhead bridge carrying said railway over the street; over Tremont street by an overhead bridge carrying said railway over the street; over Goundry street by an overhead bridge carrying said railway over the street; over Christiana street by an overhead bridge carrying said railway over the street; over Schenck street by an overhead bridge carrying said railway over the street; over Ransom street by an overhead bridge carrying said railway over the street;

over Robinson street by an overhead bridge carrying said railway over the street; over Wheatfield street by an overhead bridge carrying said railway over the street; over the grades of Payne avenue, Linwood avenue, Fredericka street, East Felton street, Jackson avenue, Stenzel street, and Ward road by bridges carrying said railway over said streets; at grade the Witmer road and over the present grades of any other streets or alleged streets proposed to be crossed by this railway between Wheatfield street, and Ward road, including Fourteenth, Fifteenth, Sixteenth, Seventeenth, Eighteenth and Nineteenth avenues, providing, however, that said railway company shall not be compelled to construct crossings at such alleged streets, including Fourteenth, Fifteenth, Sixteenth, Seventeenth, Eighteenth, and Nineteenth avenues until determination in reference thereto shall be made by the Commission upon further application either by the railway company or the city of North Tonawanda."

2. That this order is made upon the condition and understanding that the Frontier Electric Railway Company shall upon the request of any proper officer, board, or commission, and upon the determination of the Public Service Commission, carry out the terms of a certain stipulation dated March 1, 1918, and filed with this Commission, made by the Frontier Electric Railway Company and the International Railway Company, which said stipulation is in the following words:

"It is stipulated and agreed by the undersigned International Railway Company and the undersigned Frontier Electric Railway Company that upon the issuance of an order in above case No. 5834, granting consent of the Public Service Commission to the acquisition by the Pennsylvania Railroad Company and the Delaware, Lackawanna and Western Railroad Company of all the issued and outstanding capital stock of Frontier Electric Railway Company, and in consideration thereof and of the benefits to be derived by the undersigned from the consummation of the improvement of the River road (State route No. 30) in the village of LaSalle, N. Y., said International Railway Company and Frontier Electric Railway Company will cooperate in carrying out the

plan for the amelioration of the existing conditions caused by railroad crossings at grade in the Military Road and Main street in said village of LaSalle, and for that purpose do agree to and with the State of New York, that whenever in the improvement of the River road in the village of LaSalle (State route No. 30), the State Highway Commission shall construct a highway or bypass connecting the portions of the River road in said village south of the track of the New York Central Railroad Company between Military Road and Main street in said village, then and in that event said Frontier Electric Railway Company and said International Railway Company will jointly contribute and pay twelve thousand dollars (\$12,000) toward the cost and expense of such highway and bypass at such time or times as they may be called upon to pay said amount during or upon completion of such work, by the officer, board, or commission in charge thereof, but said International Railway Company and said Frontier Electric Railway Company shall not be further obligated in respect of the work of constructing said bypass."

3. That this order is granted upon the condition that the Frontier Electric Railway Company, its successors and assigns, will do, carry out, fulfill, and perform all of the conditions set forth in the permissions granted by the city of Buffalo to said company to cross any of the streets of said city.

4. That the order of this Commission made on the 17th day of October, 1916, in case No. 5673, granted upon petition of Frontier Electric Railway Company as to its railway proposed to be constructed in and between Buffalo and Niagara Falls crossing certain streets and highways and creeks, also as to certain franchises, is hereby ratified and confirmed, and shall remain in full force and effect except as said order is amended, changed, or supplemented by the terms of this order.

5. That the Frontier Electric Railway Company shall within twenty days after the service upon it of a copy of this order notify the Commission whether the terms of this order are accepted and will be obeyed.

6. That the order of March 20, 1917, suspending the order of October 17, 1916, is hereby vacated and annulled.

In the Matter of the Application for Revocation of Certificate Heretofore Issued to the FRONTIER ELECTRIC RAILWAY COMPANY that Public Convenience and a Necessity Required the Construction of its Railroad

Case No. 5915

(Public Service Commission, Second District, March 19, 1918)

Application for revocation of a certificate of convenience and necessity granted to the Frontier Electric Railway Company by the Board of Railroad Commissioners, on the ground of laches.

The Erie Railroad Company on February 6, 1917, filed a petition asking the Commission to revoke the certificate of convenience and necessity granted to the Frontier Electric Railway Company by the old Board of Railroad Commissioners on the 14th day of November, 1906. Answer was duly made to the petition by the electric railway company and the matter was several times adjourned. On May 21, 1917, the New York Central Railroad asked to be heard in favor of revoking the certificate theretofore issued to the Frontier Electric Railway Company and was permitted to become a party. Upon the testimony adduced, *held* that the times within which the Frontier Electric Railway Company was required by law to begin construction of its road and to complete the same had several times been extended by statute and that said periods of time had not expired and that the certificate of 1906 was properly and lawfully granted. The applications of the petitioning railroads for the revocation of the certificate were denied and the case ordered closed on the books of the Commission.

BY THE COMMISSION.—The Erie Railroad Company having heretofore and on the 6th day of February, 1917, filed its petition asking this Commission, pursuant to section 10 of the Railroad Law, to revoke the certificate of convenience and necessity granted to the Frontier Electric Railway Company by the Board of Railroad Commissioners on the 14th day of November, 1906, under section 59 of the Railroad Law as then in force, and the Frontier Electric Railway Company having at a later date made answer to the petition of the Erie Railroad Company and the

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application having come on to be heard by this Commission on the 15th day of March, 1917, at the city of Buffalo, N. Y., at which time the Erie Railroad Company appeared by Messrs. H. A. Taylor and S. F. Carr, its attorneys; the Frontier Electric Railway Company by Messrs. Cohn and Baumhofer, its attorneys; the Delaware, Lackawanna and Western Railroad Company by Louis L. Babcock, Esq., its attorney; the Pennsylvania Railroad Company by Frank Rumsey, Esq., its attorney, and by J. G. Rodgers, Esq., its superintendent; Bertron, Griscom & Company by E. G. Connette, Esq.; the city of Tonawanda by Seward H. Millener, Esq., city attorney; the city of Niagara Falls by H. A. Constantine, Esq., deputy corporation counsel; the Chamber of Commerce of the Tonawandas by Dow Vroman, Esq.; the Board of Trade of Niagara Falls by George M. Tuttle, Esq.; the city of North Tonawanda by James B. Lindsey, Esq., city attorney; the village of LaSalle by Fred Brooks, Esq., its president, and the city of Buffalo, N. Y., by J. J. Hurley, Esq., assistant corporation counsel; and the case having been adjourned from time to time and evidence both in favor of and against the prayer of the petition having been presented and during a portion of said hearings the State Department of Highways having been represented by F. A. Hermans, Esq., bridge engineer, and

The New York Central Railroad Company having thereafter and on the 21st day of May, 1917, filed a petition asking that it might be heard on the question of revoking the certificate theretofore issued to the Frontier Electric Railway Company, and the Frontier Electric Railway Company having joined issue by filing a petition on the 21st day of May, 1917, asking that the New York Central Railroad Company be not heard on the ground of laches on the part of the latter named company, and the objection of the Frontier Electric Railway Company having been overruled and said company having thereafter filed its answer, verified the 2d day of June, 1917, and a hearing having been had upon the petition of the New York Central Railroad Company and the answer thereto in the city of Albany on the 6th day of June, 1917, at which time the New York Central Railroad Company

was represented by Maurice C. Spratt, Esq., its attorney, and D. B. Fleming, Esq., superintendent; the Frontier Electric Railway Company by Messrs. Cohn and Bogue; the Pennsylvania Railroad Company by Messrs. Rumsey and Adams; the Erie Railroad Company by H. A. Taylor, Esq.; the Delaware, Lackawanna and Western Railroad Company by Douglas Swift, Esq.; the Chamber of Commerce of Tonawanda by Dow Vroman, Esq., and the State Department of Highways by Joseph Donnelly, assistant engineer; and after evidence had been taken the hearing having been adjourned until June 18, 1917, at which time further evidence was received, and it appearing that the times within which the Frontier Electric Railway Company was required by law to begin construction of its road and to complete the same had several times been extended by statute and that said periods of time had not and have not at the time of the granting of this order expired and it further appearing that the certificate of convenience and necessity granted to the Frontier Electric Railway Company by the Board of Railroad Commissioners on the 14th day of November, 1906, was properly and lawfully granted, it is

Ordered, That the applications of the Erie Railroad Company and of the New York Central Railroad Company to revoke the certificate of convenience and necessity granted to the Frontier Electric Railway Company by the Board of Railroad Commissioners on the 14th day of November, 1906, be and the same and each of them is hereby denied and this case is hereby closed on the books of the Commission.

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In the Matter of the Alteration of Highway Grade Crossings of the INTERNATIONAL RAILWAY at Payne Avenue, Linwood Avenue, Fredericka Street, East Felton Street, Jackson Avenue, Stenzel Street, Ward Road, and Any and All Other Alleged Streets or Roads Between Payne Avenue and Witmer Road, in the City of North Tonawanda

Case No. 6330

(Public Service Commission, Second District, March 19, 1918)

Grade crossings of the International Railway at certain streets or roads in the city of North Tonawanda.

After examination of the maps and profiles filed, and upon hearing the testimony adduced, the Commission finally determined that the grade crossings of all existing streets north of Wheatfield street to the Witmer road, but not including the latter, in the city of North Tonawanda, shall be changed from grade. The specific manner in which these crossings are to be made is shown in the order in detail.

BY THE COMMISSION.—In the order of this Commission duly made and entered on the 13th day of January, 1916, in the matter of the petition of the International Railway Company as to the manner in which a double track extension of its electric railroad between the cities of Buffalo and Niagara Falls shall cross certain streets and highways, etc., it is, among other things, determined that in the city of North Tonawanda said International railway shall cross at grade the following streets: Payne avenue, Linwood avenue, Fredericka street, East Felton street, Jackson avenue, Stenzel street, Ward road, Witmer road, and any other alleged streets north of Wheatfield street to the city line, including Sixteenth street, Seventeenth street, Eighteenth street, and Nineteenth street. It is further determined (paragraph "c" of said order of January 13, 1916) "That if at any time after the date of this order proceedings shall be instituted in the manner provided by law for the change or alteration of

any of the crossings made at grade by the petitioner herein or its successors, then and in that event the petitioner and its successors shall be bound by the provisions of the laws of the State of New York relative to the change or alteration of grade crossings, and shall pay the same proportion of the cost of the work as would be paid by a steam surface railroad under like conditions, and shall not claim in any such proceedings any exemption from the obligations which it or they may be required to assume under the provisions of this order; nor shall any claim be made by the petitioner or its successors in any of the proceedings contemplated in this paragraph that it or they are exempt from the provisions of this order relative to grade crossings because of the fact that it is a street surface railroad, it being the intent hereof that proceedings to alter or change any of the crossings referred to may be made in accordance with the statutes relating to the altering or changing of similar crossings involving a steam surface railroad, and that the petitioner and its successors shall be bound by such proceedings in all respects."

By virtue of the foregoing provision of the order last above mentioned, the Commission, on January 22, 1918, ordered that the International Railway Company, the city of North Tonawanda, and all persons interested show cause why it (the Commission) should not proceed to alter all and each of said grade crossings between Wheatfield street and Witmer road, including the crossings heretofore mentioned at Payne avenue, Linwood avenue, Fredericka street, East Felton street, Jackson street, Stenzel street, Ward road, and any and all other streets and alleged streets in the city of North Tonawanda.

Upon this order a hearing was held in the city of Buffalo on February 7, 1918, Messrs. E. G. Connette, Morris Cohn, jr., H. C. Riexinger, and M. M. Oille appearing for the International Railway Company; James P. Lindsay and C. L. Oelkers for the city of North Tonawanda; E. P. Lovejoy, F. C. Butler, A. M. Everhart, and B. A. Lewis for the Chamber of Commerce of the Tonawandas; and several interested property owners either by counsel or in person; at which time due proof of publication of

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the notice of the hearing and of personal service of such notice upon all of the interested property owners was filed.

At this hearing a map was submitted in evidence and marked "Respondent's Ex. No. 1," said map, which is untitled and undated, being now on file with this Commission. Upon it is shown the profile of the railroad as it exists at the present time, and a revised profile bearing the following description: Beginning at station 375 plus 80.55, at a point about 3,020 feet south of Payne avenue, and continuing thence level a distance of about 2,070 feet; thence ascending toward the north at the rate of two-tenths per cent a distance of about 750 feet; thence level a distance of about 350 feet; thence continuing to ascend toward the north at the rate of 0.0465 per cent a distance of about 2,150 feet; thence level about 1,850 feet; thence descending at the rate of 0.7 per cent a distance of about 1,571 feet; thence descending at the rate of 0.5 per cent a distance of 800 feet; thence descending about 357 feet on a 0.7 per cent grade to join the surface of the tracks as they exist at the present time a short distance south of the Witmer road crossing. The profile thus described will carry the grade of the railroad over the grade of Payne avenue, Linwood avenue, Fredericka street, Jackson avenue, East Felton street, Stenzel street, and Ward road, at such elevation as to provide at least 13 feet clear headroom from the surface of the street to the lowest portions of the bridge structures over these streets; and similarly, a headroom of 13 feet over any other streets or alleged streets crossing between Wheatfield street and Ward road, providing such streets are constructed upon or approximately upon the surface of the surrounding country as it exists at the present time.

The City of North Tonawanda also desired that structures should be provided over Fifteenth avenue, Sixteenth avenue, Seventeenth avenue, Eighteenth avenue, and Nineteenth avenue (herein previously referred to as streets), these avenues being not now open nor in use by the public. Upon objection by the railway company, the city of North Tonawanda, as shown by reso-

lution duly adopted by its common council at a meeting held on February 21, 1918, a certified copy of said resolution being on file with this Commission, finally requested this Commission "to reserve the matter of the crossings at Fourteenth, Fifteenth, Sixteenth, Seventeenth, Eighteenth, and Nineteenth avenues in this city, until such time as the Frontier Railway Company begins construction of its road, and that when such construction is commenced, further application as to these crossings be made to the Public Service Commission and the method of such crossings be then determined."

After due consideration the Commission has finally determined that the grade crossings of all existing streets north of Wheatfield street to the Witmer road, but not including the latter, shall be changed from grade; and therefore hereby

Orders: 1. That the streets hereinafter mentioned in this paragraph shall be carried under a revised grade of the International Railway, beginning at a point about 3,020 feet south of Payne avenue, and continuing from said point northerly substantially as shown on blueprint plan "Respondent's Ex. No. 1," hereinbefore referred to; the crossings of said streets, to wit: Payne avenue, Linwood avenue, Fredericka street, Jackson avenue, East Felton street, Stenzel street, and Ward road, shall be of the full widths of the respective streets, and of such dimensions as to provide a clearance of a minimum of 13 feet without necessitating a revision or a substantial revision of the street surfaces as they now exist.

2. That this Commission now determines nothing in respect of the crossings at Fourteenth avenue, Fifteenth avenue, Sixteenth avenue, Seventeenth avenue, Eighteenth avenue, and Nineteenth avenue; in accordance with the request of the city of North Tonawanda, the determination of the manner of crossing of said avenues to be reserved pending the construction of the Frontier Electric Railway, and the filing of a petition by the duly authorized authorities of said city of North Tonawanda or by the railway company for a determination as to how said streets and any other and alleged streets between Wheatfield street and Witmer

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road shall cross the tracks of said International Railway Company.

3. That all bridges herein provided for, except at Payne avenue, where at the option of the railroad a bridge of truss design may be provided, shall be of plate girder construction supported by masonry abutments with faces located upon street lines.

4. That the said existing crossings at grade between Wheatfield street and Witmer road may remain at grade until and in the event of the construction of the Frontier Electric Railway (a railway proposed to be built immediately adjacent to the International Railway), and that upon the construction of said last mentioned [Frontier] railway the International Railway Company shall proceed with the elimination of the grade crossings in the manner and under the terms as herein provided.

5. That under section 94 of the Railroad Law, the cost of the work herein ordered and provided for and made necessary on the part of the International Railway Company, including the cost of all lands, rights, or easements necessary or required, and of any land or other damages whatsoever which may arise by virtue thereof, and any and all costs of construction and expenses incidental thereto, shall be properly chargeable to the project and be payable and be paid as follows: 50 per cent by the International Railway Company, 25 per cent by the city of North Tonawanda, and 25 per cent by the State of New York.

6. That this order is made upon the condition and understanding that the International Railway Company shall upon the request of any proper officer, board, or commission, and upon the determination of the Public Service Commission, carry out the terms of a certain stipulation dated March 1, 1918, and filed with this Commission, made by said International Railway Company and the Frontier Electric Railway Company, which said stipulation is in the following words:

"Before the Public Service Commission of the Second District of the State of New York.

"In the Matter of the application of the Pennsylvania Railroad

Company and the Delaware, Lackawanna and Western Railroad Company to acquire all of the issued and outstanding capital stock of Frontier Electric Railway Company, amounting to twenty-five thousand dollars. [Case No. 5834.]

“Petition of Frontier Electric Railway Company in the matter of its railway proposed to be constructed in and between Buffalo and Niagara Falls crossing certain streets and highways and creeks; also as to certain franchises. [Case No. 5673.]

“It is stipulated and agreed by the undersigned International Railway Company and the undersigned Frontier Electric Railway Company, that upon the issuance of an order in above case No. 5834, granting consent of the Public Service Commission to the acquisition by the Pennsylvania Railroad Company and the Delaware, Lackawanna and Western Railroad Company of all the issued and outstanding capital stock of Frontier Electric Railway Company, and in consideration thereof and of the benefits to be derived by the undersigned from the consummation of the improvement of the River road (State route No. 30) in the village of LaSalle, New York, said International Railway Company and Frontier Electric Railway Company will cooperate in carrying out the plan for the amelioration of the existing conditions caused by railroad crossings at grade in the Military Road and Main street in said village of LaSalle, and for that purpose do agree to and with the State of New York, that whenever in the improvement of the River road in the village of LaSalle (State route No. 30), the State Highway Commission shall construct a highway or bypass connecting the portions of the River road in said village south of the tracks of the New York Central Railroad Company between Military Road and Main street in said village, then and in that event said Frontier Electric Railway Company and said International Railway Company will jointly contribute and pay twelve thousand dollars (\$12,000) toward the cost and expense of such highway and bypass, at such time or times as they may be called upon to pay said amount during or upon completion of such work, by the officer, board, or commission in charge thereof; but

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said International Railway Company and said Frontier Electric Railway Company shall not be further obligated in respect of the work of constructing said bypass.

"Dated March 1, 1918.

"INTERNATIONAL RAILWAY COMPANY,

" [SEAL]

By E. G. CONNETTE, *President.*

"Attest: GEO. W. WILSON, *Secretary.*

"FRONTIER ELECTRIC RAILWAY COMPANY,

" [SEAL]

By COHN, CHORMANN & FRANCHOT, *Attorneys.*

"Attest: SAMUEL ELLIS, *Secretary.*"

7. That the order of this Commission made on the 13th day of January, 1916, in case No. 5342, granted upon the petition of International Railway Company as to proposed extension of its railroad between Buffalo and Niagara Falls crossing certain streets and highways, and as to said extension crossing railroads, also as to certain franchises, is hereby ratified and confirmed, and shall remain in full force and effect except as said order is amended, changed, or supplemented by the terms of this order.

8. That the International Railway Company shall within twenty days after the service upon it of a copy of this order notify the Commission whether the terms of this order are accepted and will be obeyed.

In the Matter of the Petition of the FROST GAS COMPANY, under Section 70, Public Service Commissions Law, for Authority to Acquire all of the Issued Capital Stock of ALDEN-BATAVIA NATURAL GAS COMPANY, THE AKRON NATURAL GAS COMPANY, THE ATTICA NATURAL GAS COMPANY, ONTARIO GAS COMPANY, NORTH BUFFALO NATURAL GAS FUEL COMPANY, and 4,342 Shares of the Capital Stock of NIAGARA LIGHT, HEAT AND POWER COMPANY

Case No. 5934

(Public Service Commission, Second District, March 21, 1918)

Acquisition by a gas company of the entire outstanding capital stock of natural gas companies authorized.

The Frost Gas Company brought the present proceeding under section 70 of the Public Service Commissions Law for the purpose of securing the right to acquire all of the issued capital stock of the Alden-Batavia Natural Gas Company and other similar corporations. The Commission, after a public hearing, sent the matter to the division of capitalization, and that division upon investigation filed with the Commission its recommendation that the application of the Frost Gas Company be granted and that such company be allowed to acquire and hold the entire outstanding issues of capital stock of the several natural gas companies covered by the application, subject, however, to the usual terms and conditions in the order specifically set forth.

Petition filed February 28, 1917.

Hearing held April 11, 1917.

Reports of division of capitalization dated December 11, 1917, and March 11, 1918.

BY THE COMMISSION.—Now, therefore, upon the foregoing record, ordered as follows:

1. That the Frost Gas Company is hereby authorized to acquire and hold the entire outstanding issues of capital stock of the following corporations at costs to it of not more than the amounts shown below:

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Company	Par value outstanding	Cost
(a) Alden-Batavia Natural Gas Company	\$300,000 00	\$1,092,289 69
(b) The Akron Natural Gas Com- pany	195,400 00	435,706 25
(c) The Attica Natural Gas Com- pany	10,000 00	29,162 37
(d) Ontario Gas Company	200,000 00	431,977 17
(e) North Buffalo Natural Gas Fuel Company	10,000 00	11,282 25

upon the following terms and conditions:

(a) That as the purchase prices allowed herein for the stocks of the various companies named are predicated upon the statements of the assets and liabilities of those companies as of August 31, 1917, reported by the Commission's division of capitalization, it can only be paid if the assets of those companies exceed their liabilities upon the dates of the acquisition of the stock by the Frost Gas Company by at least the same amounts.

(b) That the Frost Gas Company in accepting this order agrees that it will not at any time carry upon its books as an asset the capital stocks of the companies named in this order at higher values than those then indicated for them by correct statements of the excess of the assets of those companies over their liabilities.

2. That the Frost Gas Company is hereby authorized to acquire and hold 4,342 shares each of the par value of \$50, aggregating a par value of \$217,100, of the outstanding capital stock of the Niagara Light, Heat and Power Company, at a total cost to it of not more than \$1.

3. That the Frost Gas Company shall for each six months' period ending June thirtieth and December thirty-first file not more than thirty days from the end of such period a verified report which shall show:

- (a) What stocks have been acquired during such period.
- (b) The date of such acquisition.
- (c) From whom such stocks were acquired.

(d) The amount and nature of the consideration paid for the same.

(e) Any other terms and conditions of such acquisition.

Such reports shall continue to be filed until the stocks of the corporations named in this order shall have been acquired in accordance with the authority contained herein, and if during any period no such stocks were acquired the report shall set forth such fact.

4. That the authority contained in this order to acquire stock is upon the express condition that the petitioner accepts and agrees to comply in good faith with the provisions hereof and before any stocks are issued pursuant hereto and within thirty days of the service hereof the said company shall file with the Commission a satisfactory verified stipulation over the signatures of its president and secretary accepting this order with all its terms and conditions, and such order shall be void and of no force or effect until such stipulation shall have been filed as last above provided.

Petition of CARRIERS FOR RELIEF from the Provisions of Section 36 of the Public Service Commissions Law, as amended by Act Approved June 9, 1917

Case No. 6072

(Public Service Commission, Second District, March 21, 1918)

Application of New York Central lines for leave to advance rates on sundry commodities and on live stock and fresh or dressed meats.

The New York Central lines, the petitioner, under date of March 10, 1918, filed with the Commission a request for authority to advance transportation rates. After full consideration such authority was granted. The advanced sundry commodities rate is herein given in order No. 4 and the determination of the Commission relative to increased rates on live stock and fresh or dressed meats is given in order No. 5 herein.

This case includes an investigation as to the establishment of advanced rates on sundry commodities, and also the establishment of increased rates on live stock and fresh or dressed meats.

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The determination of the Commission in respect to the application as to sundry commodities is given in order No. 4, as follows:

BY THE COMMISSION.— Upon petition of the carriers operating within the jurisdiction of this Commission filed March 19, 1918, by the New York Central lines (W. S. Kallman, Assistant Freight Traffic Manager), it appearing to the Commission that the convenience of the carriers, the public, and the Commission will be better served by granting the relief prayed for in said petition, the Interstate Commerce Commission in its order of March 12, 1918, having vacated and set aside as of March 25, 1918, its order of suspension as to interstate rates in its Investigation and Suspension Docket No. 1125, Eastern Commodity Case,

It is ordered, That in those instances in which carriers are permitted under this Commission's Special Permission No. 6973 of March 20, 1918, to file, on not less than one day's notice to the public and the Commission and not earlier than March 25, 1918, schedules providing for the cancellation of postponement supplements heretofore issued under authority of this Commission's Special Permission No. 6891 dated December 24, 1917, and establish the increased rates contained in said schedules which are now under postponement until June 30, 1918, the said carriers, until further ordered, be and they are hereby authorized to establish such increased rates applicable to sundry commodities in New York State traffic without observing the requirements of section 36 of the Public Service Commissions Law as amended by act approved June 9, 1917.

The Commission does not hereby approve any rates that may be filed under this authority, all such rates being subject to protest, suspension, complaint, investigation, and correction if considered to be in conflict with any of the provisions of the laws of the State of New York.

The determination of the Commission in respect to the application for increased rates on livestock and fresh or dressed meats is given in Order No. 5, as follows:

BY THE COMMISSION.—Upon petition of the carriers operating within the jurisdiction of this Commission filed March 19, 1918, by the New York Central Lines (W. S. Kallman, Assistant Freight Traffic Manager), it appearing to the Commission that the convenience of the carriers, the public, and the Commission will be better served by granting the relief prayed for in said petition, the Interstate Commerce Commission in its order of March 12, 1918, having vacated and set aside as of March 25, 1918, its order of suspension as to interstate rates in its Investigation and Suspension Docket No. 1124—Eastern Live Stock Fresh Meat Case,

It is ordered, That in those instances in which carriers are permitted under this Commission's Special Permission No. 6974 of March 20, 1918, to file, on not less than one day's notice to the public and the Commission and not earlier than March 25, 1918, schedules providing for the cancellation of postponement supplements heretofore issued under authority of this Commission's Special Permission No. 6917 of date January 11, 1918, and establish the increased rates contained in said schedules which are now under postponement until June 30, 1918, the said carriers, until further ordered, be and they are hereby authorized to establish such increased rates applicable to live stock and fresh or dressed meats in New York State traffic without observing the requirements of section 36 of the Public Service Commissions Law as amended by act approved June 9, 1917.

The Commission does not hereby approve any rates that may be filed under this authority, all such rates being subject to protest, suspension, complaint, investigation, and correction if considered to be in conflict with any of the provisions of the laws of the State of New York.

In the Matter of the Petition of the NORTHERN NEW YORK UTILITIES, Inc., under Section 69, Public Service Commissions Law, for Authority to Issue \$480,000 in Bonds under an Existing Mortgage, \$144,000 First Preferred Capital Stock, and \$79,200 Common Capital Stock.

Case No. 6375

(Public Service Commission, Second District, March 28, 1918)

Authority granted to Northern New York Utilities, Inc., to issue certain bonds and shares of capital stock under an existing mortgage.

On March 6, 1918, the Northern New York Utilities, Inc., filed its petition for the granting of the authority herein given and the matter was referred to the division of light, heat and power, and that division reported thereon on March 9, 1918. The division of capitalization also filed a report bearing date of March 12, 1918. A hearing was had by the Commission on May 18, 1918, and on the facts there adduced and upon the reports of the two divisions above named the authority asked for was granted by the Commission. This order authorized the said corporation to issue \$480,000 face value of its five per cent fifty-year first and refunding mortgage gold bonds under a certain deed of trust or mortgage dated July 1, 1913, given to the Northern New York Trust Company (Columbia Trust Company, successor) as trustee, and supplement thereto dated March 11, 1915, to secure an authorized issue of bonds of a total face value of \$10,000,000; also to issue \$192,000 par value of its capital stock, \$128,000 of which shall be classified as seven per cent cumulative first preferred capital stock and \$64,000 as common capital stock, the issue thus authorized to be sold at not less than par value. The purposes for which the said bonds are to be issued are specifically set forth in the order, which is granted with the usual restrictions.

Petition filed March 6, 1918.

Report of division of light, heat and power dated March 9, 1918.

Report of division of capitalization dated March 12, 1918.

Hearing held March 18, 1918.

Order entered March 19, 1918.

Report of division of capitalization dated March 27, 1918.

BY THE COMMISSION.—Now, therefore, upon the foregoing record, ordered as follows:

1. That the Northern New York Utilities, Inc., is hereby authorized to issue \$480,000 face value of its 5 per cent fifty-year first and refunding mortgage gold bonds under a certain indenture, deed of trust or mortgage dated July 1, 1913, given to the Northern New York Trust Company (Columbia Trust Company, successor), as trustee, and supplement thereto dated March 11, 1915, to secure an authorized issue of bonds of a total face value of \$10,000,000.

2. That the Northern New York Utilities, Inc., is hereby authorized to issue \$192,000 par value of its capital stock, \$128,000 of which shall be classified as 7 per cent cumulative first preferred capital stock and \$64,000 as common capital stock, which may be sold at a price not less than the par value thereof to realize net proceeds of at least \$192,000.

3. That said bonds of the total face value of \$480,000 may be sold for not less than 85 per cent of their face value to realize net proceeds of at least \$408,000.

4. That the proceeds of said securities so authorized, which shall not be less than \$600,000, shall be used solely and exclusively for the following purposes.

(a) To build a new dam, canal and power house, and install the necessary equipment therein to produce 5,000 horse power (with provision for the installation of equipment for 2,500 horse power more, making a total of 7,500 horse power at its plant at Black River, N. Y.....	\$500,000
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(b) To install one 1,800 horse power wheel with generator, switchboard apparatus, transformers, penstock, headgates and racks, and appurtenances at its plant at Effley Falls on the Beaver river.....	100,000
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\$600,000

in so far as the same may be applicable, provided:

(1) That the proceeds of such securities shall be applied

toward the costs of the above only in so far as such costs effect real increases in the fixed capital of the petitioner as defined by the uniform system of accounts for electrical corporations adopted by this Commission.

(2) That there shall be no charges to fixed capital on account of engineering services in connection with such construction unless such engineering services shall have been rendered either by other than the regular officers and employees of the corporation, or, in a proper case, where such services may have been rendered by certain of such officers or employees under an express assignment to such construction or improvement work.

(3) That if there shall be required for the aforesaid purposes, subject to the limitations herein contained, a sum less than the total amount of proceeds realized from the sale of stocks and bonds herein authorized to be issued, the remainder of such proceeds shall not be used for any other purpose without the further order of this Commission.

(4) That the estimated costs contained herein are not intended to be and must not be construed by the petitioner as having been determined upon by the Commission as the actual costs of the property and work to be acquired and done and thus properly chargeable to fixed capital, but are intended and shall be construed only to be a present estimate of the probable costs of such property and work, the actual costs of which must be actual expenditures made as defined by the Commission's uniform system of accounts for electrical corporations.

5. That none of the said bonds herein authorized shall be hypothecated or pledged as collateral by the Northern New York Utilities, Inc., unless any such pledge or hypothecation shall have been expressly approved and authorized by this Commission.

6. That the Northern New York Utilities, Inc., shall for each six months' period ending June thirtieth and December thirty-first file not more than thirty days from the end of such period a verified report which shall show:

- (a) What securities have been sold during such period.
- (b) The dates of such sales.

(c) To whom such securities were sold.

(d) What proceeds were realized from such sale.

(e) Any other terms and conditions of such sale.

(f) In detail the amount expended during such period of the proceeds of the securities herein authorized for each of the purposes specified herein, and the account or accounts under the uniform system of accounts for electrical and gas corporations to which the expenditures for such purposes have been charged, giving all details of any credits to fixed capital in connection with such expenditures.

(g) A summary of the expenditures for each of such purposes during the period covered by the report.

(h) A summary by the prescribed accounts showing the expenditures during such period.

In reporting under subdivisions (g) and (h) of this clause there shall be further shown the expenditures of the proceeds of the securities herein authorized to the beginning of the period reported upon and a total showing such expenditures to the end of the period, together with a statement of the balances in the fixed capital accounts as of the beginning and ending of such period.

Such reports shall continue to be filed until all of said securities shall have been sold or disposed of and the proceeds expended in accordance with the authority contained herein, and, if during any period no securities were sold or disposed of or proceeds expended, the report shall set forth such fact.

7. That as bonds herein authorized to be issued are sold the petitioner shall charge to an account to be called "suspense to be amortized" an amount equal to one-third of the discount incurred thereupon and shall thereafter amortize the amount so charged by crediting that account and charging "other contractual deductions from income" in equal annual installments during the ten years commencing January 1, 1918, provided that the said company may amortize the said sum more rapidly than herein provided if it so desires.

8. That the authority contained in this order to issue securities

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is upon the express condition that the petitioner accepts and agrees to comply in good faith with the provisions hereof and before any securities are issued pursuant hereto and within thirty days of the service hereof, the said company shall file with the Commission a satisfactory verified stipulation over the signatures of its president and secretary accepting this order with all its terms and conditions, and such order shall be void and of no force or effect until such stipulation shall have been filed as last above provided.

Finally, it is determined and stated, that in the opinion of the Commission the money to be procured by the issue of said securities herein authorized is reasonably required for the purposes specified in this order and that such purposes are not in whole or in part reasonably chargeable to operating expenses or to income.

EDUCATION DEPARTMENT

In the Matter of the Appeal of ARTHUR F. RILEY from the Refusal of District No. 8, Town of Hempstead, Nassau County, to Provide Academic Instruction for its Pupils

Case No. 413

(Decided January 11, 1918)

Necessity for the maintenance of academic instruction in a school district of ample resources.

District No. 8, town of Hempstead, Nassau county, has an assessed valuation of \$1,163,700. It employed in 1917 fourteen teachers and had 573 pupils in its school. Nevertheless it maintained no academic department. The appellant resides in the district and has a son who at the age of fifteen years has completed the school work of the grades maintained in the district. The appellant has requested that academic instruction be provided by the district but this request has been refused. It is from this refusal that the appeal herein is brought. *Held*, that the resources of the district are ample to justify some provision for academic instruction. Order as to the course to be taken by the board of education. Appeal sustained.

FINLEY, Commissioner.—The appellant resides in district No. 8, town of Hempstead, Nassau county. His son is fifteen years of age and has completed the school work of the grades maintained in the district. He has requested that academic instruction be provided at the expense of the district. This request has been refused.

This district has an assessed valuation of \$1,163,700. Fourteen teachers were employed last year and 573 pupils were registered. No academic department is maintained. The resources of the district are ample to justify some provision for the instruction of pupils in academic subjects. A similar question was before me for decision in the matter of the appeal of Dedek from the refusal of district No. 4, Hempstead, to provide academic instruction for its pupils. It was held that: "The Department

cannot overlook the inadequacy of the provisions now made for the instruction of the children of the district who have completed all of the courses which are prescribed by its board of education. It will be the duty of the board immediately to take such action as may be necessary, either by making some suitable provisions, through the schools of neighboring districts, for the instruction of such pupils who desire or are required by law to attend, or by the employment of additional teachers and the extension of existing school facilities within the district so as to provide appropriate instruction in academic subjects for the advanced pupils of the district."

The doctrine declared in the case cited is applicable to this case and must control its determination.

The appeal is therefore sustained.

It is hereby ordered that the board of education of district No. 8, town of Hempstead, Nassau county, be and it hereby is directed to either provide for the giving of instruction in subjects in advance of the elementary grades in the public school of the district by the employment of additional teachers and the extension of existing school facilities, or to contract immediately with the school authorities of other districts for the payment of the cost of instruction of pupils of the district who desire or who are required to attend upon instruction in advance of the elementary grades; and that such board be and it hereby is directed to raise by tax levy, as provided by law, such amounts as may be required to pay the cost of such instruction.

In the Matter of the Appeal from the ACTION OF THE DISTRICT MEETING IN DISTRICT No. 12, TOWN OF DEER PARK, ORANGE COUNTY, Relative to Transportation of Pupils and Payment of Tuition

Case No. 414

(Decided January 14, 1918)

Duty of a school district to provide conveyances for pupils residing at great distances from the school-house.

District No. 12, town of Deer Park, Orange county, at a meeting held May 8, 1917, refused to provide conveyances for the pupils residing in a certain portion of the district, or to pay for the tuition and transportation of the academic pupils of the district. The appellant is a resident and taxpayer of the district and appeals from this action. *Held*, that the relief sought by the appellant can only be obtained by application to the town board of education. He should apply to that board and if aggrieved by its decision may then appeal to the Commissioner. Appeal dismissed.

FINLEY, Commissioner.—The appellant, Chauncey I. Gumaer, is a resident and taxpayer of district No. 12, town of Deer Park, Orange county. He appeals from the action of the annual school meeting held in such district on May 8, 1917, in refusing to provide conveyance for the pupils residing in a certain portion of the district for the period of the school year and in refusing to pay the tuition and transportation of the academic pupils of such district. The petition and supporting affidavits were served on the trustee of the district on May 22, 1917. No answer has been interposed and it does not appear that the matters alleged in the petition have ever been brought to the attention of the board of education of the town of Deer Park.

Under the provisions of the Township School Law (Laws of 1917, chap. 328) the office of the district trustee was abolished and the respondent's office became vacant on August 1, 1917. The town board of education having jurisdiction over this district has ample power under the provisions of the present law to which

reference is above made to provide transportation for school children when necessary under regulations to be prescribed by it. The duty also devolves upon such board to provide academic instruction for the resident pupils of academic grade. Application may now be made by the appellant to the board of education of such township for the relief sought, and an appeal will lie in the event of the refusal of such board to afford adequate school facilities for the children.

Because of the change in the school administration effected by the Township School Law, an appeal from the action of the annual district meeting cannot now furnish the basis for a determination of the rights of the parties. The relief sought by the appellant upon the appeal may not be obtained without a presentation of the matters to the town board of education. The appellant should apply to such board for the relief sought, and if he deems himself aggrieved by the action of such board he may then bring his appeal to the Commissioner of Education.

The appeal is dismissed.

**In the Matter of the Appeal from the Action of a Joint Meeting
of School Districts Nos. 9 and 17 in School Unit No. 2, Town
of Eaton, Madison County, Held September 7, 1917**

Case No. 416

(Decided March 12, 1918)

To effect a consolidation of districts a majority of the qualified voters of each district sought to be consolidated must vote in the affirmative.

Edson A. Fuller, district superintendent of schools of the third supervisory district of Madison county, on August 17, 1917, issued an order consolidating school districts Nos. 9 and 17 in the town of Eaton, Madison county. The order was issued under the Township School Law, as added by chapter 328 of the Laws of 1917, amending section 330 of the Education Law. To determine the consolidation two meetings of the qualified electors of the two districts were held. At the second meeting the qualified electors from district No. 17 voted in favor of consolidation.

The vote in district No. 9 was a tie. It appears that ten of those who voted in favor of the consolidation were not qualified electors and could not legally participate in the meeting. *Held*, that the consolidation of the district did not receive the approval of the majority of the qualified electors of district No. 9 present and voting at the meeting. Because of this fact the consolidation was not effected and cannot be sustained. Appeal sustained.

Carlos J. Coleman, attorney for appellants.

FINLEY, Commissioner.— The appeal herein is brought from the acts and proceedings of a joint district meeting held in school districts Nos. 9 and 17, town of Eaton, for the purpose of voting upon the question of consolidating such districts. It appears that Edson A. Fuller, district superintendent of schools of the third supervisory district of Madison county, issued on August 17, 1917, an order consolidating school districts Nos. 9 and 17 in school unit No. 2 of the town of Eaton. Such order was issued under the provisions of section 330 of the Education Law, as added by chapter 328 of the Laws of 1917, known as the Township School Law. Before such order became effective it was necessary under this section that it be approved by a majority vote of the town board of education of the school unit in which the districts were located, and be thereafter approved by a majority vote of the qualified electors of each district present and voting at a joint meeting of the qualified electors of the two districts. The town board of education of the town school unit approved the order. A meeting of the qualified electors of the two districts for the purpose of voting upon the question of consolidation was held on August 31, 1917. A vote was taken at this meeting, but because of some discrepancy between the number of voters participating and the number of ballots cast, it was decided to take a second ballot and the meeting was adjourned for this purpose until September 7, 1917. At the adjourned meeting the proposition was submitted and the vote taken by recording the ayes and noes. The qualified electors from district No. 17 voted in favor of the consolidation. The vote of the electors of district No. 9 resulted in a tie, and upon a second ballot it appears from

the minutes that twenty-three votes were recorded in favor of the consolidation and twenty-two against it.

The petitioners allege that the clerk of the meeting erroneously recorded the votes cast by the electors of district No. 9, in that one of the electors who is recorded as voting in the affirmative did in fact cast his vote in the negative. The allegation is supported by the affidavit of the person voting, who states specifically that he voted against the consolidation but was recorded in its favor. It is further alleged that a number of the electors who voted in favor of the consolidation were not qualified electors of the district, in that they were only temporarily within the district and did not either own or hire taxable real property therein.

The papers upon the appeal were duly served on the district superintendent, the clerk of the board of education of the town school unit and the clerk of the joint district meeting. No answer has been interposed, and, therefore, the allegations of the petition have not been denied. In the absence of such denial it must be assumed that the allegations as set forth in the petition are true. It is definitely and positively asserted that at least ten of the persons who voted in favor of the consolidation were laborers upon the farms of residents of the district, who were temporarily occupying tenant houses upon such farms and were merely sojourning there for the purpose of giving temporary aid in the harvesting of crops. This statement is sufficient of itself to show that they were not qualified electors and had no legal right to participate in the meeting. It is alleged that they were permitted to vote under the protest of the appellants, and that the acceptance of their votes in favor of the consolidation resulted in a reversal of the will of a majority of the qualified electors of the district.

Upon this statement of facts it must be held that the consolidation of the districts did not receive the approval of a majority of the qualified electors of district No. 9 present and voting at the meeting. Because of this fact the consolidation was not effected and cannot be sustained.

The appeal is sustained.

It is hereby ordered, That the acts and proceedings of the joint district meeting in school districts Nos. 9 and 17 of school unit No. 2 in the town of Eaton, Madison county, held on September 7, 1917, purporting to approve the order consolidating such districts issued by the district superintendent on August 17, 1917, be and the same hereby are set aside.

In the Matter of the Appeal of FRANK LEWIS for Leave to Examine the Records of School District No. 3 in the Town of Colonie, Albany County

Case No. 418

(Decided March 12, 1918)

Right of a collector to refuse to exhibit school records under certain circumstances.

Jacob V. Pearce, the collector of school district No. 3, town of Colonie, Albany county, refused the demand of a trustee of the district to exhibit certain school records. Upon the facts shown appeal dismissed.

FINLEY, Commissioner.—An appeal was filed in January, 1917, by Frank Lewis, one of the trustees of district No. 3, town of Colonie, from the alleged refusal on the part of Jacob V. Pearce, the collector of said district, to exhibit to the appellant certain school records in his possession. On February 9, 1917, the respondent, Jacob V. Pearce, filed a statement with this Department to the effect that he had filed with the district clerk of said district all accounts and orders for the school years 1914–1916 and had caused a notice thereof to be served upon the appellant.

On May 2, 1917, the Township School Law took effect, thereby changing the school administration from the former district system to the township system with a town board of education, which took office on August first. No complaint has been made or filed with the Department by the present school authorities as to failure to obtain the school records from said district No. 3.

The appeal is, therefore, dismissed.

**In the Matter of the Application for the Removal of LEWIS
EDMINISTER as Trustee of School District No. 33 of the Towns
of Catharine and Rector, Schuyler County**

Case No. 420

(Decided March 12, 1918)

Effect of Township School Law is to abolish district boards.

The Township School Law (Laws of 1917, chap. 328) provides that the office of district trustee was abolished on the incoming of the new town board of education. Application dismissed.

FINLEY, Commissioner.—The last pleading in the above entitled proceeding was filed with this Department on April 20, 1917. On May 2, 1917, the Township School Law took effect, thereby changing the school administration from the former district system to the township system, with a town board of education which took office on August first. Under the provisions of the Township School Law (Laws of 1917, chap. 328) the office of district trustee was abolished, and the respondent in this proceeding went out of office under the provisions of the law at the time the new town board of education took office.

There is therefore no reason for the continuance of this proceeding and the same is dismissed.

**In the Matter of the Appeal of the VERNON HIGH SCHOOL
ALUMNI ASSOCIATION as to the Propriety of Using the School
Building for the Annual Meeting of the Association**

Case No. 421

(Decided March 12, 1918)

Permission to use a school building for meetings of the Alumni Association is largely a matter within the discretion of the board of education.

In May, 1917, the Alumni Association of the Vernon High School, located in district No. 7 of the town of Vernon, Oneida county, applied

to the board of education for permission to use the high school building for the holding of its annual meeting or reunion. The board of education of union free school district No. 7 refused the application of the association. This board is no longer in existence, the building being now under the control of the board of education of the town school unit of which such district is a part. Such board assumed office on August 1, 1917. No order can be made herein but at the next annual meeting the board of education will be guided by the ruling herein made that the use of the building by such association for the purpose of its annual meetings and luncheons will be permitted.

FINLEY, Commissioner.—The Vernon High School is located in district No. 7 of the town of Vernon, Oneida county. A new high school building was erected in said district something over a year ago. In May, 1917, the Alumni Association of said high school made application to the board of education to permit the use of the building for the purpose of holding its annual meeting or reunion. Permission was refused by the board and this appeal is taken from such refusal.

The Alumni Association is composed of one hundred and eighty-one graduate members, sixty-two honorary members by marriage and forty-two faculty and ex-faculty members. Its purposes are to afford an opportunity for the graduates to meet each year and to promote the welfare of the school in general. But one meeting is held each year following the commencement exercises in June. It is customary to serve a luncheon on such occasions, which, prior to the erection of the new school building, has been given in the village hall. It is alleged that the basement of the new building furnishes an excellent place for such meetings, and that, because of the intimate relations between the association and the school, permission to hold the meeting and its accompanying luncheon in the new school building should have been granted by the board.

The objections which seem to have been urged against granting such permission were based mainly upon the grounds that the association is an exclusive organization, that a charge is made for the luncheon or banquet served to the members and that the board would be criticised by the taxpayers for permitting the preparation and service of the luncheon or banquet in the building.

Section 455 of the Education Law defines the uses to which a school building may be put when not in use for school purposes, with the consent of the board of education and under regulations to be prescribed by it. Among such uses are the following:

"For holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such meetings, entertainments and uses shall be non-exclusive and shall be open to the general public.

"For meetings, entertainments and occasions where admission fees are charged, when the proceeds thereof are to be expended for an educational or charitable purpose; but such use shall not be permitted if such meetings, entertainments and occasions are under the exclusive control, and the said proceeds are to be applied for the benefit of a society, association or organization of a religious sect or denomination, or of a fraternal, secret or other exclusive society or organization."

An association such as this cannot be considered as exclusive within the meaning of this section. It is open to all graduates of the school without any distinction. Any charge made is for the purpose of defraying the actual expense of the meetings. Such organizations have proved themselves of great benefit to the schools with which they are associated by promoting interest in the school through the encouragement and aid of its alumni. While permission to use a school building is largely a matter of discretion on the part of a board of education, nevertheless, an appeal will lie from a refusal to permit its use for a given purpose, and if it appears that the board has erred in the exercise of such discretion its action will be overruled.

In my opinion the use of the building as contemplated for the annual meeting of this association is eminently proper and within the provisions of the section above referred to, and the board erred in refusing its permission for the use of the building as requested.

The only apparent purpose of this appeal is to obtain a ruling of this Department as to the propriety of using the school building for the annual meeting of the Alumni Association. The board

of education of union free school district No. 7, which refused to permit such use, is no longer in office. The school building is now under the control of the board of education of the town school unit of which such district is a part. Such board assumed office on August 1, 1917, and the former board of education of the district ceased to exist at that time.

No formal order may, therefore, be entered in this appeal. If the question of the use of the building by the Alumni Association for its annual meeting should arise at the end of the present school year, the board of education will be guided by the ruling herein made, to the effect that the use of the building by such association for the purpose of its annual meetings and luncheons is permissible.

IN THE MATTER OF THE DISSOLUTION OF DISTRICT NO. 11, TOWN OF
JOHNSTOWN, FULTON COUNTY

Case No. 415

(Decided April 18, 1918)

Rules relating to appeal to the Department to be strictly enforced.

The appellants herein are taxpayers of former district No. 11, town of Johnstown, who on November 1, 1915, appealed from an order executed on May 7, 1914, by Fred A. Stryker, district superintendent of schools of the first supervisory district of Fulton county, dissolving said district No. 11 and annexing the territory thereof to district No. 6, town of Ephratah in such county. *Held*, that the rules relating to appeals require petitions to be filed within thirty days from the date of the action appealed from. This rule is to be strictly enforced and under it the appeal must therefore be dismissed.

Smith & Moyer, attorneys for appellants.

FINLEY, Commissioner.— The appellants herein, taxpayers of former district No. 11, town of Johnstown, filed, on November 1, 1915, a petition on appeal from an order executed on May 7, 1914, by Fred A. Stryker, district superintendent of schools of the first supervisory district of Fulton county, dissolving said district No.

11 and annexing the territory thereof to district No. 6, town of Ephratah in such county. The papers on the appeal do not set forth a copy of the order appealed from, nor does the petition state any excuse for the delay in the bringing of the appeal for a period of more than one year and five months. Because of the delay in attempting to appeal from the order of dissolution, the petition was not entertained and was canceled of record, in accordance with the practice of this Department, on July 1, 1917.

The attorneys for the petitioners have requested that formal action be taken in the appeal. The rules relating to appeals require petitions to be filed within thirty days from the date of the action appealed from. This rule is to be strictly enforced unless some sufficient reason exists for failure to comply therewith. In no case may an order dissolving a school district or consolidating it with another district be set aside on an appeal brought more than one year subsequent to the order of dissolution and consolidation.

The appeal must therefore be dismissed.

In the Matter of the Appeal of LOUISE J. COOKE and Others
Against the BOARD OF EDUCATION OF THE CITY OF NEW YORK

Case No. 408

(Decided April 22, 1918)

The appointment by the board of education of New York city of teachers qualified to teach in certain grades to temporary positions as teachers of higher grades but at the lower grade salary cannot be allowed.

The petitioner herein, Louise J. Cooke, brought her petition in her own behalf and in behalf of about one hundred and eight other teachers similarly placed. In her own case she received in February, 1898, a teacher's license No. 1, grade B, and was appointed a regular teacher in the elementary schools of the city in August, 1898, and has served continuously some eighteen years. In 1901 her teacher's license No. 1 was made permanent. In 1915 the petitioner was assigned to teach in the grades of the seventh and eighth years and has since continued

so to serve, but while teaching in the grades of the seventh year the appellant had been paid for her services at the rate fixed for teachers in grades below the seventh year. The record discloses that the appellants have for periods covering from one to four years occupied positions in the grades of the seventh and eighth years without possessing licenses or credentials entitling them legally to hold such positions. Vacancies in such positions should be filled only by appointments from an eligible list containing the names of the holders of such license for promotion. The temporary assignment of an unqualified teacher to a vacant position may be justified in case of some public necessity. The school authorities of the city were not justified, however, in filling such positions for an unreasonable period of time by the transfer of teachers from lower grades. Such practice has the result of putting such teachers in the higher positions permanently. They are not entitled to the salaries to be paid teachers regularly appointed as they have not been legally appointed to such positions. This policy the Education Department condemns as having not only been a violation of law but also an injustice to the teachers and to the pupils under them. The board and the other proper city officers should take forthwith such action as may be necessary to provide an eligible list of licensees for promotion so that the positions in the seventh and eighth years may be legally filled by teachers holding the necessary license. The appellants herein are not entitled to the relief which they seek and their appeal must for this reason be dismissed. Appeal dismissed.

John E. O'Brien, attorney for appellant.

Charles McIntyre, Assistant Corporation Counsel, attorney for respondents.

FINLEY, Commissioner.—The appellant, Louise J. Cooke, a teacher in the public schools of the city of New York, appeals to the Commissioner of Education for certain relief prayed for in her petition, in her own behalf and in behalf of about 108 other teachers in such schools, who are similarly placed. The appellant's petition sets forth the matters of which she and the other teachers complain, but alleges facts relating particularly to her own case.

It appears from the petition that the appellant, Louise J. Cooke, graduated from the Oswego State Normal School in February, 1898, and received a normal school diploma which qualifies her to teach in the public schools of the state. She applied for a license to teach in the elementary schools of New York city, and being exempted from examination because of her normal school

diploma, teacher's license No. 1, grade B, was issued to her on July 2, 1898. She was appointed a regular teacher in the elementary schools of the city in August, 1898, and as alleged in her petition, "since that time, appellant has continued to hold and occupy the position of regular teacher in said schools, and has now (at time of filing petition) served therein approximately eighteen years." After three years of successful teaching the teacher's license No. 1 held by the appellant was made permanent on July 2, 1901.

The classes in the elementary schools of the city of New York are divided into grades by years, each grade covering approximately one-half of the school year and the entire course covering a period of eight years. The grades are designated as follows: 1A, 1B, 2A, 2B, 3A, 3B, 4A, 4B, 5A, 5B, 6A, 6B, 7A, 7B, 8A, 8B.

The appellant, Louise J. Cooke, was assigned in September, 1915, as teacher in the grades of the seventh and eighth years, in Public School No. 20, borough of Queens, and she alleges that since that time "she has continuously served and is now serving as a regular teacher in grades 7A and 7B in such school, and particularly in charge of a class in said school in the grade designated 7A." The salaries prescribed in the by-laws of the board of education for teachers in the grades of the seventh and eighth years are higher than those prescribed for the lower grades. While teaching in the grades of the seventh year the appellant has been paid for her services at the rates fixed for teachers in grades below the seventh year.

The respondent board of education alleges that the appellant was not nominated from an eligible list, but was assigned temporarily by the principal of her school to teach grades 7A and 7B and that "she was not appointed or promoted thereto by the board of education, nor did her name appear upon any eligible list for such appointment or promotion." The assignment was signed by the principal of the school and was made apparently under authority of the board of education on a blank form as follows:

"You are hereby temporarily assigned to the charge of a class of the * * * grade until such time as the position shall be regularly filled in accordance with law and with the by-laws of the board of education.

"This assignment to a higher grade is only temporary; it is revocable at any time; it gives, of itself, no right to advanced rank or increase of salary; and, if circumstances require it, the vacancy may be filled in accordance with law by the appointment of some other teacher than yourself."

The record discloses the names of one hundred and eight other teachers who were appointed originally as regular teachers in the elementary schools of the city in the grades below the seventh year, all but two of whom held permanent teachers' licenses No. 1, and who were assigned in the same manner and with like effect as the appellant, Louise J. Cooke, to grades in the seventh and eighth years.

The appellant, Cooke, alleges in her petition that when the assignments were made she and many of the other appellants were assured that their successful service in the grades to which they were assigned "would lead to a recognition of their qualifications and to the issuance to them of the license now known as 'teacher's license for promotion,' and in support of such assurance, appellants were reminded of the fact that on or about February 1, 1915, the city superintendent of schools of the city of New York, with the approval of the board of education of said city, issued the license for promotion to a large number of teachers on the strength of successful service rendered by them under temporary assignments in the grades of the seventh and eighth years." It does not appear that this assurance was given by any competent authority and that the respondent board of education was bound by it.

On May 24, 1916, the appellant, Louise J. Cooke, and one hundred and five teachers similarly situated, and on June 7, 1916, three other teachers so situated, presented petitions to the board of education in which they requested that their names be entered upon the appropriate eligible list for the position of regular teacher in the grades of the seventh and eighth years in the

elementary schools of the city, and that there be issued to each of them, pursuant to law and the by-laws of the board of education, the license designated in such by-laws as "teacher's license for promotion." Such petitions were referred to the committee on by-laws and regulations of the board of education, and they were considered at a meeting of such committee held on June 12, 1916. Such committee denied the prayer of the petitions and refused to grant or recommend the relief therein sought. The appellants appeal from such denial and refusal of relief, and seek an order directing the respondents to reconsider their action and a further order directing the city superintendent of schools and the board of examiners of the city of New York to issue to each of them the license designated as "teacher's license for promotion," and to place their names on the appropriate eligible list for the position of regular teacher in the grades of the seventh and eighth years in the elementary schools of the city.

The appellant's contention that they are entitled to the relief sought is based upon the assumption that their licenses qualify them to hold positions as regular teachers in the grades in the seventh and eighth years in the elementary schools, that teachers' licenses for promotion should be issued to them, without further examination, and that their names should be placed on the eligible list of holders of such licenses, from which appointments to such positions should be made.

All but two of the appellants hold teachers' licenses No. 1. Some of such licenses were issued prior to January 1, 1898, the time when the original Greater New York Charter took effect, and the others were issued after such date and prior to April 13, 1910. Section 1081 of the original Greater New York Charter of 1897 authorizes the school board in each of the boroughs of the city to fix a standard of qualifications as a necessary requirement for the service of all principals and teachers in the schools of the borough. Such requirements could not be lower than the minimum qualifications established by the board of education of the city of New York. The school boards in the several boroughs were authorized by this section to prescribe the kinds of licenses

to be issued to the teachers in the schools in their respective boroughs, and it was made the duty of the board of examiners of the city to examine all prospective teachers who had to be licensed and to issue such licenses as the successful candidates were found qualified to receive.

Section 1089 of the revised charter of 1901 was a substantial re-enactment of section 1081 of the original Greater New York Charter, except that the powers of the local boards were conferred upon the board of education. It is provided therein as follows:

“The board of education on the recommendation of the board of superintendents shall designate, subject to the requirements of the state school laws in force when this act takes effect, or that may thereafter be enacted, the kinds or grades of licenses to teach which may or shall be used in the city of New York, together with the academic and professional qualifications required for each kind or grade of license. The board of education, on the recommendation of the board of superintendents, shall also designate, subject to the like limitations, the academical and professional qualifications required for the service of principals, branch principals, supervisors, heads of departments, assistants and all other members of the teaching staff.”

The construction and effect of this provision of the statutes was under consideration in the matter of the appeal of William H. Maxwell from a resolution of the board of education of the city of New York relative to the eligibility of the holders of teacher's license No. 1 as teachers of graduating classes in the elementary schools in such city. See decision of Commissioner of Education in Appeal No. 196, November 12, 1914. It was therein held that the statute did not protect existing eligible lists to the extent of preventing the imposing of additional qualifications or requiring special licenses for certain positions, and that notwithstanding the fact that the persons named on such list were eligible to appointment to certain positions at the time of the enactment of such charters, special provision might be made for the filling of such positions by appointments from new eligible lists containing the names of holders of licenses requiring greater academic and professional qualifications.

The decision in this case must be followed to the extent of holding that teachers' licenses No. 1 issued to the appellants do not confer upon them the legal right of appointment to positions in the grades of the seventh and eighth years of the elementary schools. In conformity with this decision it must be held that the board of education was authorized legally to require a special license for teachers appointed to such grades. Having established the requirement that teachers appointed to such positions should possess special licenses, it was required by statute that the names of the persons to whom such licenses were issued should be placed upon an eligible list and that appointments to such positions should be made from such lists.

It should be noted that the appellants were assigned temporarily by the principals of the schools in which they taught to teach the grades in the seventh and eighth years, but have never been nominated for such positions from an eligible list nor appointed or promoted thereto by the board of education, as required by law. The appellants do not appear to contend that they have been legally appointed to the positions which they hold. They merely seek in this appeal a remedy whereby their informal designation to fill such positions shall be made legal and valid. For this reason they ask that the appropriate licenses be issued to them and that they be placed upon the appropriate eligible list. In seeking such remedy they concede in effect that the licenses which they now hold do not qualify them as teachers in the grades of the seventh and eighth years.

The by-laws of the board of education prescribe the licenses to be issued to teachers for service in the public schools of the city. Among the licenses issued to teachers in the elementary schools are teacher's license No. 1 and teacher's license for promotion. It appears that teacher's license No. 1 was provided for in the by-laws of the board adopted on or about May 9, 1898, and has been in existence and recognized by the by-laws of the board continuously from that time to the present. Under the by-laws of 1898 it was provided that no one should be appointed as a regular teacher of a class in an elementary school who did not hold either a teacher's

license No. 1 or a license of a higher grade, and it has been provided in the various by-laws relating to such license that no person could teach in any of the grades in the elementary day schools of the city who did not possess such license or its equivalent. The teacher's license for promotion appears to have been first recognized by the board of education in a by-law adopted on June 25, 1902, in which it was prescribed that "A license for promotion shall qualify the holder to act as teacher in the grades of the last two years of the elementary school course." It was also provided in such by-law that a teacher of a graduating class must not only hold a license for promotion but also must have served at least one year in other grades of the last two years of the course. The by-laws of the board were further amended in February, 1903, as to the qualifications of a teacher of a graduating class, by requiring the teacher to hold a license for promotion and in addition thereto to have had satisfactory experience in teaching equivalent to five years' experience in the public schools of the city, two of which shall have been in the grades of the last two years of the elementary school course. In May, 1908, the license for promotion was abolished, but the special license for a teacher of a graduating class was retained. In amending the by-laws by abolishing the license for promotion it was provided that persons holding such license should continue to enjoy all rights and privileges conferred by it.

The effect of abolishing the license for promotion was to render the holder of a teacher's license No. 1 eligible to appointment to the grades in the seventh year and the first grade in the eighth year, while only the holder of a license of a teacher of a graduating class could teach in the last grade of the eighth year. Teacher's license No. 1 continued effectual as a credential for grades 7A, 7B and 8A until April 13, 1910, when the by-laws were again amended by restoring the teacher's license for promotion. Such license was inserted in the list of licenses to be issued to teachers for service in the elementary day schools. Subdivision 4 of section 66 of the by-laws was amended at this time so as to provide as follows:

"4. A license for promotion shall qualify the holder to teach in grades 7A, 7B and 8A in elementary schools. A license as teacher of a graduating class shall qualify the holder to teach a class of grade 8B. These provisions however shall not affect or impair the rights, if any, now existing of any person eligible at the time of the passage of this by-law (April 13, 1910) to teach in grades 7A, 7B, 8A and 8B."

The construction, application and effect of the amendment to section 66 of the by-laws made on April 13, 1910, so far as the same relates to the teacher's license for promotion, will control the determination of this appeal. In the first place the by-law provides for and requires the issuance of such license. Provision being made for the license, the statute requires that a list shall be prepared containing the names of the holders thereof, from which appointments are to be made. Subdivision 4 of the by-law provides that such license qualifies the holder thereof to teach in grades 7A, 7B and 8A. No person except a holder of such license may be appointed legally to a position as teacher in such grades. The contention of the appellants is that the saving clause contained in this subdivision of the by-law preserves to the holders of teacher's license No. 1 their eligibility to appointment as teachers in such grades, and that being eligible to appointment, licenses for promotion must be issued to them and their names must be placed upon the appropriate eligible list.

The practice in the department of education of the city of New York and sound educational policy recognize the propriety of requiring higher or special qualifications for teachers in the grades of the seventh and eighth years of the elementary schools. The teachers employed in the grades of the seventh and eighth years are paid a greater salary than teachers in the grades of the first six years. The transfer of a teacher who has been employed in the grades of the first six years to the grades in the seventh and eighth years is to be regarded as an advance in grade or promotion. The requirement that persons appointed to positions in the grades in the last two years of the elementary course shall possess a teacher's license for promotion, indicates the purpose of providing

a method for filling the positions in the grades of the last two years by the appointment of those already employed in the lower grades. The board of education in prescribing the teacher's license for promotion intended evidently to provide a means of determining the teachers already employed in the grades of the first six years of the elementary course who were qualified by experience to be advanced to the grades in the seventh and eighth years. A teacher is not qualified to teach in the grades of the first six years of the elementary course unless possessed of teacher's license No. 1.

Having in mind the evident purpose of the board in designating or establishing the license for promotion, it is difficult to construe the clause in the by-law providing for such license, to the effect that such provision "shall not affect or impair the rights, if any, now existing of any person eligible at the time of the passage of this by-law to teach in grades 7A, 7B, 8A and 8B," so as to preserve teacher's license No. 1 as a qualification for appointment to positions in such grades. If every teacher employed in the grades of the first six years at the time the by-law was enacted, holding teacher's license No. 1, was to be deemed eligible to promotion to positions in the grades in the seventh and eighth years, the result would be a nullification of the obvious purpose of the by-law. The by-law should not be construed to produce such a result if any other reasonable construction may be placed upon it.

At the time when the by-law was amended in 1910 the license known as the license of a teacher of a graduating class was in existence, which license authorized the holder to teach the graduating classes in the elementary schools. The holder of a promotion license was not qualified to teach such classes. There were licenses in existence issued in the several cities consolidated in Greater New York authorizing the holders thereof to teach in the grades in the seventh and eighth years, including the graduating classes of the elementary schools. The language used for the purpose of saving the rights of persons eligible to positions in such grades is in substance or effect the same as language used in other by-laws of the board pertaining to the qualifications of teachers. It is not vital to a determination of the issues raised in this appeal to

point out the particular licenses preserved or protected by this saving clause. It is sufficient to hold that the board of education by requiring teachers promoted to the grades in the seventh and eighth years to hold licenses for promotion, intended to add to the qualifications required of teachers in the grades in the first six years, and to require teachers in such grades holding teacher's license No. 1, the next lower license in order, to obtain upon examination or in the manner provided by law the license for promotion. Unless a teacher employed in the grades in the first six years and holding a teacher's license No. 1 was entitled to rights and privileges other than those arising from such license, she would not be entitled to the privileges conferred by the saving clause in the by-law and could not legally be appointed to a position in the grades of the seventh and eighth years unless such license for promotion was issued to her and her name appeared upon the appropriate eligible list.

The appellants in their prayer for relief in the petition ask that the city superintendent of schools be ordered and directed to issue to each of them the license designated in the by-laws of the board of education as "teacher's license for promotion" and that the city superintendent and board of examiners be ordered and directed to enter the names of the appellants upon the appropriate eligible list for the position of regular teacher in grades of the seventh and eighth years in the elementary schools of the city. Since this appeal was brought, section 1089 of the revised Greater New York Charter, relating to the examination of teachers, teachers' licenses, eligible lists and the appointment of teachers, has been repealed by the so-called City School Law, being chapter 786 of the Laws of 1917. Under subdivision 5 of section 872 of such law, the board of education of a city may designate the kinds and grades of licenses which shall be required for service as a teacher, "together with the academic and professional qualifications required for each kind or grade of license." It is further provided therein that "No person required to have a license under the provisions of this chapter in order to be employed in a position, who does not have such license, shall have any claim for salary."

It is provided in section 871 of such act that it shall be the duty of the board of examiners in a city having a population of 1,000,000 or more to "hold examinations whenever necessary, to examine all applicants who are required to be licensed or to have their names placed upon eligible lists for appointment in the schools in such city, except examiners, and to prepare all necessary eligible lists." When such lists are prepared, it is provided in subdivision 5 of section 872 of such act that in a city having a population of 400,000 or more recommendations for appointment to the teaching service "shall be from the first three persons on appropriate eligible lists prepared by the board of examiners." In section 4 of such chapter 786 of the Laws of 1917, it is provided that "The rules and regulations adopted by a board of education in pursuance of any law hereby repealed shall continue in full force and effect notwithstanding such repeal, until the same are modified, amended or repealed by the board of education as provided in this chapter."

The by-laws of the board of education of the city of New York which provide for the teacher's license for promotion and prescribe the qualifications therefor are continued in full force and effect until modified by the board under the present law. Eligible lists in force at the time of the taking effect of such act and the relative standing of persons whose names are on said lists are not to be affected by the passage of the act. The names of the appellants do not appear upon the eligible list of holders of teachers' licenses for promotion.

The teacher's license for promotion having been duly designated as a qualification for appointment to positions in the grades in the seventh and eighth years, it becomes the duty of the board of examiners, under section 871 of the City School Law, to examine all applicants for such license and to place the names of successful candidates upon eligible lists. Under subdivision 5 of section 872 of such act, the appellants may not be appointed as regular teachers to the positions now held by them in the grades of the seventh and eighth years, unless their names appear on the eligible list so prepared by the board of examiners. The law does not confer

upon the board of education of the city of New York the power to dispense with such examination. The commissioner of education may not authorize, direct or order the city superintendent to issue licenses to teachers except in conformity with the law and the by-laws of the board. Nor may the city superintendent or the board of examiners be directed to place the names of the appellants upon an eligible list unless they have taken the necessary examinations and licenses have been issued to them as a result thereof.

The record discloses that the appellants have for periods covering from one to four years occupied positions in the grades of the seventh and eighth years without possessing licenses or credentials entitling them legally to hold such positions, though it is apparent that the board of education and other school authorities of the city authorized the transfer of the appellants to such positions. On the other hand the board of education recognized the sound educational policy of requiring special qualifications of teachers holding positions in the grades of the seventh and eighth years by prescribing a rule requiring them to possess the license for promotion. The logical effect of such regulation was to require that vacancies in such positions should be filled only by appointment from an eligible list containing the names of the holders of such license for promotion. While a temporary assignment of an unqualified teacher to a vacant position may be justified in case of some public necessity, the school authorities of the city were not justified in filling such positions for an unreasonable period of time by the transfer of teachers from lower grades. Such teachers have in effect been placed permanently in such positions; but since they have not been legally appointed to such positions they are not entitled to the salaries to be paid to teachers regularly appointed thereto. As a result, such teachers have been paid salaries lower than those scheduled for the positions occupied by them. The policy pursued has not only been in violation of law, but is also an injustice to the teachers and to the pupils under instruction. The board of education and the other proper school officers of the city should take forthwith such action as may be necessary to provide an appropriate eligible list of holders of

licenses for promotion, so that the positions in the grades of the seventh and eighth years may be legally filled by teachers holding the necessary licenses.

The appellants herein are not entitled to the relief which they seek, and their appeal must for this reason be dismissed. They should be given full opportunity to take examinations for the licenses required for such positions, and an eligible list should be prepared so that if they qualify they may be legally appointed to positions in such grades.

The appeal is dismissed.

In the Matter of the Appeal from an ORDER OF DISTRICT SUPERINTENDENT CHARLES A. HEIST, Dissolving District No. 8, Town of Amherst, Erie County, and Annexing the Territory Thereof to Union Free School District No. 3, Town of Amherst

Case No. 410

(Decided April 22, 1918)

Where an order of consolidation is properly made a presumption exists in favor of the propriety of the order of consolidation and such order will be allowed to stand.

On May 1, 1917, Charles A. Heist, district superintendent of schools of the first supervisory district of Erie county, executed an order dissolving school district No. 8, town of Amherst, Erie county, and annexing the territory thereof to union free school district No. 3 of such town. This order was made under section 129 of the Education Law, which gives to such district superintendent the requisite power. Union free school district No. 3, town of Amherst, contains more than 1,500 inhabitants and is therefore not within the provisions of the Township School Law (Laws of 1917, chap. 328). The assessed valuation of the dissolved district and the distances that the children thereof would be required to travel to attend the school in the union free school district have not been shown by the appellant. The facts disclosed show clearly that the consolidation will promote the educational welfare of both districts. The appellant has failed to overcome the presumption that exists in favor of the propriety of the order of consolidation and such order will be allowed to stand. Appeal dismissed.

Alvin E. Ouchie, attorney for appellant.

George W. Walters, attorney for respondents.

FINLEY, Commissioner.— This appeal is brought from an order executed on May 1, 1917, by Charles A. Heist, district superintendent of schools of the first supervisory district of Erie county, dissolving School District No. 8 of the town of Amherst, Erie county, and annexing the territory thereof to Union Free School District No. 3 of such town. Such order was executed under the provisions of section 129 of the Education Law, which authorizes the district superintendent to dissolve the district and unite the territory thereof to any adjoining school district.

Union Free School District No. 3, town of Amherst, has a population of more than 1,500 inhabitants and is, therefore, not within the provisions of the Township School Law (Laws of 1917, chap. 328).

The appellant has failed in his petition to show the assessed valuation of the dissolved district and the distances that the children thereof would be required to travel to attend the school in the union free school district. The map which is filed indicates that the extreme eastern boundary of District No. 8 is less than two miles from the eastern boundary of District No. 3. The main thoroughfare lies east and west through both districts. A trolley line runs through both districts, which is available for the transportation of the children of the dissolved district to and from the school-house in District No. 3. The dissolved district is a common school district, giving instruction in elementary branches only. The union free school district maintains a graded school with an academic department, and it is proposed to erect a new building for the accommodation of the children of both districts. The records of this department show that a considerable number of the children of the dissolved district have attended the school in the district to which the territory is annexed.

The two districts are so located as to form a natural and logical school unit. The taxable property in District No. 8, as well

as that in Union Free School District No. 3, should contribute to the erection and maintenance of a suitable school building, so located as to be conveniently accessible to all the children of the consolidated district. The school facilities thus afforded will be superior to those now provided for the children of District No. 8, and by use of the street railway line extending through the district such children may attend school without great hardship.

The facts disclosed indicate clearly enough that the consolidation will promote the educational welfare of both districts. The appellant has not succeeded in overcoming the presumption that exists in favor of the propriety of the order of consolidation, and such order will be allowed to stand.

The appeal is dismissed.

In the Matter of the Appeal from Certain Acts of the Board of Education of Union Free School District No. 4, Town of Hunter, Greene County, and from the Election of the Board of Education of Town School Unit No. 1 of said Town

Case No. 417

(Decided April 22, 1918)

The statute directing in terms that the trustees and members of the board of education of the districts comprising a town school unit shall "elect members of the board of education" really directs an appointment by the trustees and members of the board of education of the districts in the unit.

The school unit from the action of which this appeal is taken consists of school districts Nos. 6, 8 and 10 and union free school district No. 4 of the town of Hunter, Greene county. The trustees of such school districts and the board of education of such union free school district met on June 12, 1917, for the purpose of electing or appointing a board of education of the school unit under the provisions of chapter 328 of the Laws of 1917 (Township School Law). The proceedings at such meeting are specifically stated in the order herein. By a resolution adopted the secretary of the meeting cast one vote for each member. This appeal is brought upon the ground that such election was improperly conducted. From the evidence adduced *held*, that the appointees were the

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unanimous choice of the members of the board authorized to appoint; that their designation was in substantial compliance with the purpose of the statute and that they are entitled to hold their offices. Appeal dismissed.

Harrie McK. Curtis, attorney for appellant.

Edward W. Lackey, attorney for respondents.

FINLEY, Commissioner.—The appeal herein is brought from the action of the trustees and members of the board of education of the school districts comprising School Unit No. 1, town of Hunter, Greene county, in electing members of the board of education of such school unit. It appears that such school unit consists of School Districts Nos. 6, 8 and 10 and Union Free School District No. 4 of such town. The trustees of such districts and the board of education of such union free school district met on June 12, 1917, for the purpose of electing or appointing a board of education of the school unit, as provided by chapter 328 of the Laws of 1917, known as the Township School Law. The trustees of School Districts Nos. 6, 8 and 10 were present at such meeting and participated therein. The board of education of Union Free School District No. 4 consisted of five members. Two of such five members were present at the meeting and took part in the proceedings. The other three members of the board were present at the meeting, but did not participate therein because of a question which had arisen as to their title to office. Because of the fact that it is alleged in the petition herein that the three members of the board whose titles to their offices had been attacked did not participate in the election of the board of education of the town school unit, it is unnecessary to determine as to their right to hold their offices.

The trustees and members of the board of education proceeded to elect Edward W. Lackey, James C. Constable and Alonzo Holdridge as members of the board of education of the town school unit. The appellant complains that the election was not conducted as required by statute and asks that the election be set aside as illegal. He bases his claim of illegality upon the grounds

that the election was not by ballot; that the persons declared elected did not have a majority of the votes of all of the members of the board, and that the chairman and clerk of the meeting did not canvass the votes cast for the candidates.

It appears from the record of the meeting held for the election of the board of education of the school unit that the members were elected without opposition, the secretary of the meeting casting one vote for each member, pursuant to a resolution duly adopted. No other candidates were nominated and no question was raised at the time as to the regularity or validity of the proceeding.

The statute provides that the trustees and members of the board of education of the districts comprising the town school unit shall "elect members of the board of education" of the unit, and directs the chairman and clerk of the meeting to canvass the votes cast for the candidates for the offices to be filled and provides that the candidate receiving a majority of the votes cast shall be elected. While this provides in terms for an election, it is in reality an appointment by the trustees and members of the board of education of the districts in the unit. The statute does not require the taking of a ballot, and there is nothing in the section which prevents the designation of members of the board by resolution directing the clerk of the meeting to cast a ballot for the respective candidates. It is clear that the persons appointed were the unanimous choice of the members of the board authorized to appoint, and it must, therefore, be held that their designation was in substantial compliance with the purpose of the statute. The persons designated were duly qualified electors of the town school unit, and having been designated without protest on the part of any member of the appointing board they must be deemed to have been duly appointed and are, therefore, entitled to hold their offices.

The appeal is dismissed.

In the Matter of the Appeal of MARGARET M. FOTHERINGHAM
from the Action of the Board of Education of the City of
Buffalo Dismissing Her as a Teacher in the Department of
Public Instruction of the City of Buffalo

Case No. 422

(Decided April 24, 1918)

The absence of a teacher from her duties without lawful consent justifies a board of education in dismissing her from the service.

On October 29, 1917, the board of education of the city of Buffalo by resolution suspended Miss Margaret M. Fotheringham, the appellant, from her position as a teacher in the department on the ground that she had absented herself from duty without having asked for or received any permission from the board or the superintendent of education. On the hearing had in the matter it appeared that the appellant failed to report for service at the time of the opening of the public schools of the city on September 4, 1917, and that she was absent without leave from that time for a period of about sixty days. The reason for not being able to report for service at the opening of the school was that she was serving a sentence of sixty days imposed upon her by the Police Court of the District of Columbia for interfering with the free use of the highway in the city of Washington while "picketing" the White House. *Held*, that the testimony taken by the board of education was sufficient to sustain the findings of the board that the appellant was absent from her duties without formal or legal leave of absence and that the reason stated by the appellant as the cause of her failing to report at the opening of the schools constituted no reasonable excuse. Also *held*, that her absence constituted a plain breach of the obligations which she had taken upon herself when she accepted the position of teacher in the public schools of the city and for this reason alone the board of education acted within its jurisdiction in dismissing her from the service.

Hardy, Stancliffe & Whitaker, attorneys for appellant.

William S. Rann, Corporation Counsel, attorney for respondent.

FINEGAN, Acting Commissioner.—The appellant, Margaret M. Fotheringham, appeals from the action of the board of education of the city of Buffalo in dismissing her from her position as teacher in the department of public instruction in such city. It appears that the appellant was a duly appointed teacher of

domestic science in the Buffalo public schools and was engaged in such capacity in Grammar School No. 42 of such city. She has taught such subject in the Buffalo public schools for upward of two and one-half years, and at the time of the preferment of charges against her she was recognized as a teacher in good standing in the schools of the city.

On or about September 17, 1917, the superintendent of education of the city of Buffalo submitted to the board of education charges against the appellant, pursuant to subdivision 3 of section 872 of the Education Law, as added by chapter 786 of the Laws of 1917. It was alleged in such charges that the appellant "has been guilty of behavior detrimental to the best interests of the public schools, and has neglected to discharge the duty as a teacher and has failed to give efficient and competent service as required by the language of the school law." The superintendent of education further alleges in his specification of charges as follows:

"On information and belief, I charge that on or about the 4th day of September, 1917, said Margaret M. Fotheringham, contrary to her duty as a teacher and in violation of the law, did engage in picketing, so-called, in front of the White House, with intent to harass and annoy the President of the United States and others in authority; that she was arrested by duly appointed officers of the law, tried by a court having competent jurisdiction, found guilty and was sentenced to serve sixty days in the workhouse at Occoquan, Va., and that she is now serving this sentence in that institution.

"I further charge that said Miss Margaret M. Fotheringham was on the 4th day of September, 1917, a teacher of Domestic Science in the department and under contract to teach during the school year beginning September 4th, 1917, and that she absented herself from duty without having asked for or having received any permission from the Board or the Superintendent of Education."

On October 29, 1917, the board of education of the city of Buffalo adopted a resolution suspending the appellant from her position pending a hearing on the charges. On or about Novem-

ber 2, 1917, a copy of the formal charges preferred against the appellant was served upon her, together with a notice for a hearing to be held before the board of education on the 9th day of November, 1917. The date of the hearing was subsequently fixed for Friday, November 16, 1917, at which time the appellant appeared and made answer to the charges against her. The appellant was represented by counsel and full and fair opportunity was given for the presentation of proof in defense of the charges and for the cross-examination of witnesses who testified in support thereof.

The board of education rendered its decision on or about November 27, 1917, and determined that the appellant should be dismissed from her position as teacher in the public schools of the city. The board of education in its decision finds that the appellant failed to report for service at the time of the opening of the public schools of the city on September 4, 1917, and that she was absent without leave from that time for a period of about sixty days. Her reason for not being able to report for service at the opening of the schools was that at such time she was serving a sentence of sixty days imposed upon her by the Police Court of the District of Columbia in the Occoquan workhouse, a penal institution at Occoquan, Va. The board states in its decision that the appellant testified "That she went to Washington on August 15, 1917, was arrested three times—on the 25th of August, on the 29th of August and on the 4th of September—and was convicted each time of interfering with the free use of the highway or unlawfully assembling and blocking the highway, and that in one or more of these convictions no appeal was allowed; that an appeal was allowed and bail given for the arrest of August 29th; that she remained in Washington after September 4th and was arrested on that day, convicted, refused to pay her fine although she had the money, and served her sentence of sixty days."

No serious controversy as to the facts has arisen. The charges specified, among other things, that during the school year beginning September 4, 1917, "she absented herself from duty without having asked for or having received any permission from the

board or the superintendent of education." It is not claimed by the appellant that she obtained leave of absence from the board or superintendent. It appears from her testimony that she telephoned Miss Ethel M. Coan, the director of domestic science and her superior in office, on the morning that she left for Washington, informing her that she was going to Washington to picket the White House and might be arrested and stating that she thought that she would be away from school for probably two weeks. Miss Coan testifies that she did not understand that the appellant was asking for leave of absence and that she did not grant a leave of absence. It is apparent from the testimony that the appellant fully realized the probability of her arrest and that upon conviction she would not return because of her purpose to serve the term of her sentence rather than to pay the fine which might be imposed.

A careful consideration of the evidence shows clearly enough that the board of education was justified in its finding that the appellant was absent from her position without leave of absence. Her inability to return to her position when the public schools of the city opened on September 4, 1917, was occasioned by her voluntary act in placing herself in a situation where she was prevented from fulfilling her obligations as a teacher. She contemplated the possibility of arrest and imprisonment when she undertook the activities in which she was engaged at the time of her arrest. Under such circumstances it will not do for the appellant to now assert, as a justifiable excuse for her failure to report for duty at the opening of her school, that she was prevented from so doing by her imprisonment.

The law relative to the dismissal of public school teachers in cities provides that "Such persons and all others employed in the teaching, examining or supervising service of the schools of a city, who have served the full probationary period, or have rendered satisfactorily an equivalent period of service, prior to the time this act goes into effect, shall hold their respective positions during good behavior and efficient and competent service, and shall not be removable except for cause after a hearing by the affirmative vote of a majority of the board."

A teacher is thus protected in her tenure "during good behavior and efficient and competent service." She may be dismissed for cause consisting of a breach of any of the conditions of her tenure. If she is guilty of misconduct or neglect of duty tending to affect her competency or efficiency as a teacher, it constitutes a cause for removal. If she intentionally disobeys the rules prescribing the conduct of teachers or fails to perform duties required of her as a teacher, she violates the obligations of her employment. It is not "good behavior," within the meaning of the statute, for a teacher to absent herself, without reasonable excuse, from her position, since, although there be no rule or regulation prohibiting such absence, it constitutes necessarily a breach of the obligations attached to her position. It is obvious that there could be no efficiency of school administration if teachers, of their own accord, were permitted to leave their places for the purpose of engaging in political, social or individual activities, in no way connected with the teaching services which they are employed to perform.

The testimony taken by the board of education was sufficient to sustain the finding of the board that the appellant was absent from her duty without formal or legal leave of absence. Such absence under the circumstances was held by the board to constitute neglect of duty. The reasons stated by the appellant as the cause of her failure to report at the opening of the schools of the city and the circumstances of her detention were held properly by the board not to constitute a reasonable excuse for her absence. Her conduct in subjecting herself voluntarily to a condition or situation which must necessarily prevent her fulfilling her obligations as a teacher was properly held not to be "good behavior" within the meaning of the statute, and as she was absent from her post of duty without lawful excuse she was not rendering, as the law requires, efficient and competent service. The conclusion reached by the board as to the nature of such conduct, entirely apart from the character of the offense, was justifiable and no sufficient reason has been disclosed upon this appeal for disturbing the board's determination. There is no evidence to show, and it is not claimed by appellant, that the board acted through malice or caprice. Her absence without

lawful consent constituted a plain breach of the obligations which she had taken upon herself when she accepted the position of teacher in the public schools of the city, and for this reason alone the board of education acted within its jurisdiction in dismissing her from the service.

The appeal is dismissed.

In the Matter of the Appeal from the Decision of S. J. PRESTON,
District Superintendent of Schools of the First Supervisory
District of Westchester County, as to the Boundary between
School District No. 4, Town of Rye, and School District No. 1,
Town of Harrison

Case No. 424

(Decided May 3, 1918)

An uncontested description of the boundary lines of a school district made by a proper official must be accepted.

The question herein arose through a dispute as to whether certain lands owned by Frank C. Mertz in Westchester county are within district No. 1, town of Harrison, as alleged by Mr. Mertz, appellant, or within district No. 4, town of Rye, in said county. The matter was referred to S. J. Preston, district superintendent of schools of the first supervisory district of Westchester county. That official decided that the lands were within School District No. 4, town of Rye, and from his determination this appeal was brought. The affidavit of John W. Diehl showing that the records of the town of Rye gave the said lands as not being included in said district No. 4 of Rye and there being no proof to the contrary offered, *held* that the said lands are within and should be taxed in district No. 1, town of Harrison. Appeal sustained.

William A. Davidson, attorney for appellant.

FINEGAN, Acting Commissioner.—The appellant herein, Frank C. Mertz, is the owner of taxable real property which he alleges lies wholly within School District No. 1, town of Harrison, Westchester county, and is subject to taxation for the support of the schools in that district. It appears that a dispute arose as to

the location of the boundary line between District No. 4, town of Rye, and District No. 1, town of Harrison, and an application was made by the town board of the town of Rye to S. J. Preston, the district superintendent of schools of the first supervisory district of Westchester county, for an order declaring certain land owned by the appellant Mertz to be either in School District No. 4, town of Rye, or in School District No. 1, town of Harrison. The district superintendent considered the matter and rendered a decision that "all that portion of the property of Frank C. Mertz in the town of Rye, in question, lies wholly in school district No. 4, town of Rye." The appellant appeals from this determination and asks that a decision be rendered that no part of the land in question owned by the defendant is within School District No. 4 of the town of Rye.

The petitioner alleges that the land in question consists of about forty acres and was formerly owned by one Julia A. Park, and that he has owned such land for a period of nearly six years. He further alleges that during the time that he has owned the property the school taxes thereon have always been paid in the town of Harrison, and that he has never paid any school taxes in School District No. 4, town of Rye. The appellant in support of his contention submits the affidavit of John W. Diehl, who was a clerk of the board of education of District No. 4, town of Rye, in the year 1882 and acted as such from that time until the year 1897, and who was a member of the board of education of such district from 1898 to 1910. It is alleged therein that the deponent in 1882 searched the records in the office of the town clerk of the town of Rye and in other offices for the purpose of obtaining information as to the boundary lines of such School District No. 4. It appears that he thereupon prepared a description of the boundaries of such district, which was dated November 5, 1883, and approved by the then school commissioner of the district. A copy of the description of the boundaries as thus prepared by Mr. Diehl is included in the papers. It is further alleged by Mr. Diehl that at the time the description was prepared the location of the parcel of land now owned by the appellant was especially brought

to his attention, and it was then agreed that such parcel was not included in District No. 4, town of Rye, and was intentionally eliminated in making the description of the boundaries of such district.

The notice of appeal and the affidavits therein have been served upon the district superintendent and the town board of the town of Rye. The parties so served have not contested the accuracy of the description or the truth of the statements made by the persons who submitted affidavits in behalf of the appellant. It must, therefore, be assumed that the boundaries as described in the description referred to are the true boundaries of District No. 4, town of Rye. The statements of the appellant and the persons who testify in his behalf must be accepted upon this appeal and govern the determination thereof.

An examination of the description and the statements made by the parties discloses clearly enough that the land owned by the appellant is that which was formerly owned by Julia A. Park, situated partly in the town of Rye and partly in the town of Harrison, and that the district as described in the description of boundaries did not include the land so owned by Julia A. Park. There is nothing to indicate that such boundaries have been altered or any other official action taken so as to include such land within the boundaries of District No. 4, town of Rye. It follows, therefore, that such land, which is now owned by the appellant, Frank C. Mertz, is not included within the boundaries of such District No. 4, town of Rye, but is included and should be taxed for school purposes in District No. 1, town of Harrison.

The appeal is sustained.

It is hereby ordered, That the decision rendered by S. J. Preston, district superintendent of schools of the first supervisory district of Westchester county, on June 12, 1917, to the effect that "that portion of the property of Frank C. Mertz in the town of Rye, in question, lies wholly within school district No. 4 of the town of Rye," be and the same hereby is set aside and declared of no effect.

In the Matter of the Appeal of ALVAH LOVELACE and Others
from the Refusal of the Board of Education of the Town of
Clinton, Dutchess County, to Provide Academic Instruction
for the Pupils of Said Town

Case No. 423

(Decided May 13, 1918)

To compel a town board of education to provide academic instruction for pupils therein an application for such instruction must be made in behalf of such pupils.

In the town of Clinton, Dutchess county, are several children who have completed the work of the eighth grade of the public schools of the town and who are desirous of instruction in academic subjects. No school is provided for academic pupils in the town and the appellants herein, who are the parents of the children in question, have caused their children to attend the Poughkeepsie high school. The town board of education is alleged to have refused to pay the tuition of the children of the appellants attending from said town in the Poughkeepsie high school. *Held*, that it was the duty of the board of education of the town to provide academic instruction for the pupils therein who had completed the work of the elementary grades. Such instruction could be given either in academic courses in the town schools or by similar instruction in the schools of other towns, cities or districts. Application for such instruction in the schools of another town, city or district must be made to the board by the parents of the pupils or some one in their behalf. Also *held*, that in view of the positive statements contained in the answer herein, that no such application was made to the respondent board, the appellants have no legal ground for complaint and the appeal must be dismissed. Appeal dismissed.

Chester Husted, attorney for appellants.

Benson R. Frost, attorney for respondents.

FINEGAN, Acting Commissioner.—The appellants allege that they are residents of the town of Clinton, Dutchess county, and are parents of children who have completed the work of the eighth grade of the public schools of such town and desire to receive

further instruction in academic subjects; that there is no school maintained in the town in which such instruction is provided and that they have caused their children to enter the Poughkeepsie high school in order that they might receive such instruction. The appellants also allege that the board of education of the town of Clinton, after a demand therefor, has refused to pay the tuition of the pupils attending from said town in the Poughkeepsie high school.

An answer has been filed in behalf of the board of education, in which it is alleged that no application has ever been made to the board to provide academic instruction, except in the case of one pupil who is not included in this appeal. It is also alleged that the board has never received any official notification of the fact that the children of the appellant entered the Poughkeepsie high school, and that the appellants, or any one in their behalf, did not request the board to provide academic instruction for their children. It further appears from the answer of the respondents that the town of Clinton adjoins the towns of Rhinebeck and Washington, in which high schools are maintained where academic instruction might be received, and that the town of Clinton does not adjoin the city of Poughkeepsie, where the children are in attendance.

It is provided in section 342 of the Education Law, as added by chapter 328 of the Laws of 1917, that where pupils of school age residing in a town may be more conveniently instructed in the schools of an adjoining town or of a union free school district or city, the board of education of such town may provide for the transfer of such pupils to the school or schools in such adjoining town, union free school district or city. Where a transfer is thus made the statute requires the board of education of the town to send notice thereof to the board of education of the town, district or city to which it is proposed to transfer the pupils, and thereupon provision must be made for the accommodation of the pupils so transferred. Where a transfer is thus made, the board of education of the town, district or city in which the pupils are instructed must submit to the board of education of the town

where they reside a statement of the cost of instruction of such pupils. The cost of such instruction then becomes a charge against the town and must be paid in the same manner as other charges. The amount so charged is to be determined by agreement between the boards of education.

A board of education of a town school unit was also authorized by section 340, subdivision 9, of the Education Law, as added by chapter 328 of the Laws of 1917, to contract with boards of education of other towns, union free school districts and cities for the instruction of the pupils of the town, and, in the case of academic pupils, the State allowance for the instruction of non-resident academic pupils was to be paid to the town where the pupils reside. In all such cases the board of education of the town in which the pupils reside is required to contract for such instruction with the board of education of the town, city or district in which the pupils are instructed.

It was the duty of the board of education of the town to provide academic instruction for the pupils therein who had completed the work of the elementary grades. Such instruction could either be given in courses to be established by the board in the schools of the town or provision might be made for such instruction by transfer to the schools of other towns, cities or districts or by contract with the boards of education thereof, under the sections above referred to. In either case it is necessary that application for such instruction in the schools of another town, city or district be made to the board by the parents of the pupils or some one in their behalf. If application or request for such instruction is not made and no official action is taken in respect thereto by the board, there is no basis for an appeal to the Commissioner of Education. In view of the positive statements contained in the answer that no such application was made to the respondent board, it must be held that the appellants have no legal ground for complaint and on this account the appeal must be dismissed.

The appeal is dismissed.

In the Matter of the Appeal of CHARLES H. BLACKET and Others
from the Refusal of the Board of Education of the Town of
Marlborough to Transfer Certain Pupils to the Marlborough
High School

Case No. 425

(Decided May 13, 1918)

Transferring pupils who have not completed the eighth grade work to schools outside of the town.

The board of education of the town of Marlborough has refused the application made by Charles H. Blacket and several other residents of that town for the transfer of their children for instruction in the school maintained in the Marlborough union free school district, which is not under the jurisdiction of said respondent board. None of the children sought to be transferred have completed the work of the eighth grade or have passed the examinations prerequisite for academic recognition. *Held*, that while the interests of the children are in all cases to be considered it cannot be said that as a matter of law the board of education is bound to transfer children who have not completed the eighth grade to be instructed elsewhere at the expense of the township, unless it is shown beyond question that convenience of instruction requires such transfer. Also *held*, that the appellants have failed to show sufficient facts to authorize such transfer. Appeal dismissed.

FINEGAN, Acting Commissioner.—Charles H. Blacket and several other residents of the town of Marlborough have made application to the board of education of said town to transfer their children for instruction in the school maintained in the Marlborough union free school district which is not under the jurisdiction of said town board of education. The papers submitted by the appellants are very informal and allege in substance that on October 3, 1917, the town board of education met and decided not to pay the tuition of pupils in other schools who were not of full academic grade. It appears that in the case of each of the appellants the pupils whose transfer was requested have not completed the work given in the grades and have not passed the examinations entitling them to be recognized as academic pupils. The respondent board of education has voted

to provide academic instruction for all pupils of academic grade. Therefore, the question for determination is as to the propriety of the transfer of such pupils for instruction at the expense of the town, under the provisions of section 342 of the Township Law, upon the ground that the pupils can be more conveniently instructed in the Marlborough high school than in the schools of their own district. While the exact distance from the residence of the pupils to the schoolhouse in the district in which they live and also from their residences to the Marlborough high school is not definitely stated, it appears that the residences of nearly all of the children are much nearer the schoolhouse in their own district than the schoolhouse in the Marlborough union free school district. The transfer requested seems not to have been urged so much upon the ground of accessibility to the Marlborough high school as upon the ground of better facilities for instruction. The answer discloses that the school in each of the common school districts under the control of the town board of education is maintained with one or more competent teachers in charge, capable of instructing the children in all grade subjects. The statute evidently contemplates that the board of education shall exercise its discretion in transferring pupils upon the ground of greater convenience to the pupils. While the interests of the children are in all cases to be considered, it cannot be said that as matter of law the board of education is bound to transfer children who have not completed the work of the eighth grade to be instructed elsewhere at the expense of the township, unless it is shown beyond question that convenience of instruction requires such transfer. The appellants have failed to show sufficient facts to authorize me to require the transfer of these pupils.

The appeal is dismissed.

In the Matter of the Appeal of MARY EDWARDS CHURCH Relative
to Payment of Teacher's Wages

Case No. 426

(Decided May 13, 1918)

A teacher cannot be allowed pay for the days during which her own action results in the closing of her school.

The appellant was employed as the teacher in district No. 4, town of Greenwood, by the district superintendent, acting for the board of education. On Monday, October 15, 1917, the teacher was directed to close the school for the balance of the week. The appellant, however, failed to open the school until October 29, 1917. The present appeal is as to whether she is entitled to receive pay for the days during which she failed to teach not covered by the order of the superintendent. *Held*, that the appellant's failure to teach for the week commencing October 22, 1917, was the result of her own voluntary act and that she is not entitled to her salary for such week. Recommendation made that the allowance already offered to and refused by appellant be retendered to her by the board. Appeal dismissed.

Crayton L. Earley, attorney for appellant.

Wm. G. Kellogg, attorney for respondent.

FINEGAN, Acting Commissioner.—The appellant alleges in her petition that in May, 1917, the trustee of District No. 4, town of Greenwood, entered into an oral contract with her to teach school in said district for the term of eighteen weeks at a salary of twelve dollars and fifty cents per week, beginning September 4, 1917, which appears to have been confirmed in writing by the trustee of the district. The memorandum confirming the oral contract recites that the appellant was hired by him for the term and at the salary above stated "with no vacation for potato digging." The respondent board of education of the town of Greenwood ratified the contract and recognized the appellant as a teacher in accordance with its terms.

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It is alleged by the appellant that school was ordered closed by the district superintendent, acting for the board of education, during a period of eight regular school days in the month of October, 1917, against the protest of the appellant, and that the board has refused to pay her for this period. The respondent board states in their answer that the school was closed by their direction from October sixteenth to October nineteenth, inclusive. The board recognizes that under the contract it was not relieved from paying the teacher her salary for this period and offered to the appellant the sum of nine dollars and ninety cents in payment for such days, which she refused to accept.

It appears from the affidavits of the clerk of the board of education and the district superintendent which are filed in answer to the appeal that school was not closed during the week beginning October twenty-second at the direction of the board of education, but was closed because of the refusal of the appellant to continue school during said week. No reply has been filed by the appellant controverting these positive averments contained in the affidavits referred to. The district superintendent states that the direction which he gave to the appellant on Monday, October fifteenth, was that she should "close school for the balance of the week;" that appellant then stated that when the board got ready to open school again they could get another teacher, that she was through. The superintendent thereafter wrote to the appellant that she must complete her contract and that she had better go back and open school, which she did on October twenty-ninth. The contention of the respondents, therefore, is that they are not responsible for the closing of the school for the week commencing October 22, 1917, but that the appellant's failure to teach for this period was because of her own voluntary act, and that on this account the appellant is not entitled to her salary for such week. The facts disclosed justify this contention.

The respondent board has tendered to the appellant the amount due her as salary for the four days that the school was closed by their direction, less the deduction on account of the teachers'

retirement fund. The amount so tendered is all that the appellant is entitled to receive. It is suggested that the board again tender her the amount to which she is entitled.

The appeal is dismissed.

In the Matter of the Appeal from an Order Changing the Boundary Lines of Districts Nos. 3 and 6, Town of Roseboom, Otsego County

Case No. 428

(Decided May 13, 1918)

Provisions as to alteration of the boundaries of a school district under section 123 of the Education Law by a district superintendent.

The petitioners herein are residents and taxpayers of district No. 6, town of Roseboom, and they ask that certain farmlands in the towns of Roseboom and Cherry Valley be included within the territorial limits of district No. 6, town of Roseboom, so as to leave that district as it was before the transferring of the said farms to district No. 3, town of Roseboom. The owners of the farms in question have failed to answer the allegations of the petition although copies thereof have been served upon them, and have failed to object to the alteration of the boundaries of the district. *Held*, that the proceeding is one within the provisions of sections 123, 124 and 125 inclusive of the Education Law, and that it will be necessary for the appellants to apply to the superintendent of districts Nos. 3 and 6 so that the boundaries of district No. 6 may be re-established as prior to the transfer of the said farms. Appeal dismissed.

Elmer C. Smith, attorney for appellant.

FINEGAN, Acting Commissioner.—On April 18, 1916, District Superintendent Harrison Cossaart made an order dissolving District No. 6, town of Roseboom, and District No. 7, town of Cherry Valley, and annexing the territory of each of said districts to District No. 5, town of Cherry Valley. Thereafter an appeal was taken from that portion of the order which dissolved District No. 6, town of Roseboom, and annexed its territory to District No. 5, town of Cherry Valley. This appeal was sus-

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tained and the order of the district superintendent was set aside in so far as it related to dissolution and annexation of District No. 6, town of Roseboom. 12 St. Dept. Rept. 425.

Prior to the determination of the appeal and on or about the 7th day of September, 1916, the said district superintendent issued an order transferring certain property, to wit, the farms of Martin Steenburgh and Alvin Winnie, from said District No. 6, town of Roseboom, which had then become a part of the consolidated district known as District No. 5, town of Cherry Valley, to District No. 3, town of Roseboom, thereby changing the boundary lines of said district. As a result of such order the boundaries of District No. 3, town of Roseboom, were fixed as including such property.

The petitioners herein are residents and taxpayers of District No. 6, town of Roseboom, and they ask that the farms above mentioned be again included within the territorial limits of District No. 6, thereby leaving such district as it existed prior to the order of the district superintendent transferring such farms to District No. 3, town of Roseboom. The owners of such farms were served with copies of the petition and they have not answered the allegations contained therein, nor have they appeared to object to the desired alteration of the boundaries of the district.

It is provided in section 123 of the Education Law that the boundaries of a school district may be altered by a district superintendent with the written consent of the trustees of all the districts to be affected thereby. If the trustees do not consent to the alteration, it is provided in sections 124 and 125 of the Education Law that the district superintendent may file with the town clerk an order making the alteration, and thereupon the trustees of any district affected thereby may ask for a hearing of objections to the order before the district superintendent and supervisor and town clerk of the town.

This proceeding must be deemed to be one for the alteration of the boundaries of a district within the sections above referred to, and such alteration can only be made upon complying with

the provisions thereof. It will be necessary for the petitioners, therefore, to apply to the district superintendent for an order altering the boundaries of Districts Nos. 3 and 6, so that the boundaries of District No. 6 may be reestablished as they existed prior to the transfer of the farms in question. If the trustee of either one or the other of the districts does not consent, it will be necessary to follow the procedure prescribed in sections 124 and 125 of the Education Law. If the district superintendent or the officers before whom a hearing is had as to such alteration refuse to transfer the property, an appeal may be taken from such refusal to the Commissioner of Education and a determination will then be made as to the propriety of the alteration.

The appeal is dismissed.

ATTORNEY-GENERAL

In the Matter of Construing the CLASSIFICATIONS OF THE SELECTIVE SERVICE as to Persons Morally Unfit to be Soldiers

(Opinion dated January 31, 1918)

A person convicted of felony cannot waive deferred classification but must be placed in class V.

The provisions of the selective service regulations with respect to persons found guilty of crime but not sentenced to State prison must be construed in such manner as to protect the personnel of the army from contamination, and to keep out of the army felons and traitors. A registrant who has been convicted of felony, treason or an infamous crime cannot waive his disability. A privilege may be waived but not a disability. Such a registrant must be placed in class V. A person will be regarded as having been "convicted" of felony if adjudicated guilty of a crime punishable by a term in State prison, whether sentenced to State prison, penitentiary, reformatory, or whether merely fined or given a "suspended sentence."

Brig.-Gen. Charles H. Sherill, the Adjutant General, submitted an inquiry, together with a request for an opinion thereon, as follows:

"What is the meaning of subdivision (h) of rule XII of the Selective Service Regulations, section 79, with respect to persons found guilty of crime but not sentenced to State prison?"

LEWIS, Attorney-General.—The regulation referred to provides exemption of "A person shown to have been convicted of any crime which, under the law of the jurisdiction of its commission, is treason, felony or an infamous crime."

The purpose of this provision is to protect the personnel of the army from contamination, and to keep out of the army felons and traitors. The suggestion that a registrant who has been convicted of felony, treason, or an infamous crime may waive deferred classification and be classified in class I is obviously absurd. A man may waive a privilege but not a disability. Deferred classifi-

cation in general is a privilege, but classification under subdivisions (g) and (h) of rule XII is a matter depending upon a state of facts and not at all subject to the will of the registrant. A stranger who might seek to gain admittance to the club-house of an exclusive club, and who was stopped by the doorman as not being a member, would be considered a humorist if he offered to waive his disability. Subdivision (h) of rule XII was made a part of the Selective Service Regulations for the same reason that clubs have rules restricting the admission of strangers to their club-houses.

The question is raised as to what constitutes conviction of a crime which, under the law of New York, is treason, felony or an infamous crime. Treason is defined in section 2380 of the Penal Law and consists of levying war against the people of the State, combining to usurp the government of the State, or adhering to the enemies of the State in certain defined ways. A felony, according to section 2 of the Penal Law, is a crime which is or may be punishable by death or imprisonment in a State prison. The term "infamous crime" is not defined in our statute but the courts have defined it as "an offense implying such a dereliction of moral principle as carries with it a conviction of a total disregard of an oath." *People v. Parr*, 42 Hun, 313.

The fact that one convicted of a crime punishable by imprisonment in a State prison is actually punished by imprisonment in a penitentiary or in a State reformatory does not render him any the less a felon disqualified under subdivision (h) of rule XII.

The question has been raised as to the status of one who has been found guilty of a felony and upon whom sentence has been suspended. In *People v. Fabian*, 192 N. Y. 443, the case was considered of a man who had been found guilty of a felony and upon whom sentence had been suspended who registered and voted at an election. The Election Law provided that: "No person who has been convicted of a felony shall have the right to register for or vote at any election unless he shall have been pardoned and restored to the rights of citizenship."

The Court of Appeals held that for the purpose of construing

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the Election Law a man would not be considered to have been *convicted* of a crime unless judgment had been pronounced against him, and that since sentence had been suspended in the case of the defendant and no judgment pronounced against him, he could not be deemed to have been *convicted*. But in the more recent case of *Matter of Lewis v. Carter*, 220 N. Y. 8, the Court of Appeals practically limited the Fabian case to its facts, saying, *inter alia*: "The word 'convicted' or 'conviction' is of equivocal meaning. It may mean the adjudication of guilt whether by plea, finding or verdict. It may mean the adjudication and the judgment or sentence."

The court went on to hold that, within the meaning of the Penal Law fixing sentences of second offenders, a person who had once been adjudicated guilty of a felony and who was again adjudicated guilty of a felony should be treated as a person who had "been convicted" of a felony for the second time, even though sentence might have been suspended upon him after his first trial. I am inclined to think that for the purpose of construction of subdivision (h) of rule XII of the Selective Service Regulations we should follow the decision of *Matter of Lewis v. Carter* rather than that of the Fabian case, for the following reasons: In the Fabian case the question was whether a man had lost the right of franchise as one of the incidents of conviction of felony. Having been convicted of felony he was subject to punishment and the loss of his franchise was part of the punishment. The trial judge suspended sentence as far as concerned any punishment by imprisonment or fine, and it might be reasonably argued that this suspension should apply equally well to that part of the punishment consisting of loss of franchise. In the case of *Lewis v. Carter* the court was considering the interpretation of a statute fixing the sentences to be imposed upon certain kinds of criminals and was making the distinction between first and second offenders. It unequivocally held that a man who had been adjudicated guilty of a felony once and was later adjudicated guilty of another felony was a second offender, even though sentence had been suspended in the first instance; the theory being, apparently, that a man who

has been found guilty of felony thereby takes the status of a convict or felon whether punished by fine or imprisonment or not. Subdivision (h) of rule XII of the Selective Service Regulations was enacted for the purpose of protecting the army against contamination and not for the purpose of permitting felons to demand special privilege in exemption from draft. So we are interpreting not a provision of law which deprives a person "convicted" of certain privileges but a provision which classifies persons "convicted" as different from those who have not been convicted. We are interpreting a section which is not like the statute under consideration in the Fabian case but which is like the statute under consideration in *Lewis v. Carter*.

At various times in the past decade different judges in New York, who have had before them for sentence young men found guilty of crime, have offered to suspend sentence upon those young men on condition that they would enlist in the army or the navy. In each case there has been immediate protest from the military authorities and the applicant has been refused enlistment, the War Department and the Navy Department continually taking the stand that the army and navy are not penal institutions and that the members of the army and navy should not be subjected to contact with criminals. They have regarded the convicts in each case as criminals, notwithstanding the fact that no sentence had been imposed.

Taking this attitude of the war and navy departments into consideration, together with the conclusions of the courts mentioned, I am of the opinion that a person who has been adjudicated guilty of any crime punishable in the State of New York by death or imprisonment in a State prison (whose adjudication of guilt has not been reversed) should be classified in subdivision (h) of class V under rule XII of the Selective Service Regulations, whether he was sentenced to State prison, to a penitentiary or a reformatory, or whether he was merely fined or even given a suspended sentence.

In the Matter of CONSTRUING THE LIEN LAW as to the Priority of Liens for Labor Performed or Material Furnished for a Public Improvement Over a Prior Lien for a Debt Not Connected with Such Improvement

(Opinion dated February 14, 1918)

Priority of a lien for a public improvement over an antecedent lien against a contractor where the earlier lien is not connected with said improvement.

J. D. Patton, Albany county sheriff, on December 24, 1917, filed with the State Comptroller notice of a judgment in favor of the United States Radiator Corporation against P. F. Kenny Company, and claimed to levy upon all moneys due and to become due under a contract between the State and the said Kenny Company for plumbing and drainage at the Yonkers armory. This judgment, however, was not secured on account of any work or materials at the said armory. At a later date, January 7, 1918, the Kenny Company assigned to Thomas S. Moran all moneys due or to grow due upon the contract between the State and the Kenny Company. The question herein involved is as to which of these liens takes precedence. Under the Lien Law a lien for either labor performed or material furnished for a public improvement, pursuant to the provisions of sections 5 and 12 of the said Lien Law, has precedence over the lien of a levy made under a judgment obtained against the contracting corporation upon a debt not connected with the improvement, prior to the filing of a lien for labor or material or an assignment of the moneys due or to grow due thereon. *Held*, that the notice of lien served upon the Comptroller by the sheriff of Albany county under an execution issued upon the judgment of the United States Radiator Corporation against the P. F. Kenny Company should not be recognized by the Comptroller in the adjustment of claims against the funds applicable to the payment of the work mentioned in the contract between the State and P. F. Kenny Company relating to the plumbing and drainage at the said armory.

Hon. Eugene M. Travis, State Comptroller, submitted an inquiry, together with a request for an opinion thereon, as follows:

"To what extent should a levy or notice of a levy upon public funds, under a judgment recovered upon a claim or demand against the contractor, not connected in any way with the public improvement, be recognized in the paying out of the funds of the State appropriated for such public improvement where there are

subsequent liens filed against such funds, or the same have been assigned to a claimant for labor or material?"

LEWIS, Attorney-General.— On December 24, 1917, J. D. Patton, sheriff of the county of Albany, filed with the Comptroller a notice of a judgment in favor of the United States Radiator Corporation against P. F. Kenny Company, of \$471.27, and claimed to levy upon all moneys due and to grow due upon a contract made between the State of New York by the State Armory Board, and the said P. F. Kenny Company, for plumbing and drainage at the Yonkers armory. Subsequent to that date, and on the 7th day of January, 1918, an assignment of all moneys due or to grow due upon such contract was made by P. F. Kenny Company to one Thomas S. Moran, which assignment was duly approved by the Armory Commission and the same was duly filed with the Comptroller pursuant to the provisions of section 15 of the Lien Law. The Comptroller has received a certificate amounting to \$2,272.17 payable to Thomas S. Moran, as such assignee, and desires to be advised as to what extent the levy or notice of levy should be recognized in the payment of such moneys.

The Lien Law was enacted for the purpose of saving and protecting the two classes which contribute to the construction of property, to wit: The laborer and the materialman. Without the co-operation of both classes, real property or public work would remain unimproved and of no increased value. In order to protect and safeguard the rights and interests of both, the Legislature many years ago decided that the two classes should have liens upon the real property or public improvement to the extent to which they had respectively contributed to the augmented value of the premises. It was deemed equitable and fair that the laborer who had contributed to such augmented value by his brawn and muscle, and the materialman who had contributed with his property, should be preferred if he so desired by a lien upon such premises over the lien of other creditors who had extended credit to the owner or contractor without contributing anything toward its increased value, and generally without antici-

pation of any increase in value except as against the liens of secured creditors whose claims were upon record.

Under section 3 of the Lien Law the laborer or materialman is given a lien upon the real property improved, or to be improved, and upon such improvement from the time of filing the notice of lien as provided by section 9. Under section 5 of the same law the same parties are given a lien upon the moneys and public funds applicable to the construction of the improvement to the extent of the amount due or to become due on the contract, by filing a notice of lien with the head of the department or bureau having charge of the work and with the Comptroller in the case of a State contract as provided by section 12 of the Lien Law.

There would be no difficulty in this matter if the liens were upon real property which has been improved under the provisions of section 3 of the Lien Law, for section 13 of the Lien Law specifically provides: "A lien for materials furnished or labor performed in the improvement of real property shall have priority over a conveyance, judgment or other claim against such property not recorded, docketed or filed at the time of the filing of the notice of such lien, * * * over the claim of a creditor who has not furnished materials or performed labor upon such property; * * * over an attachment hereafter issued or a money judgment hereafter recovered upon a claim which in whole or part was not for material furnished, labor performed or moneys advanced for the improvement of such real property; and also over any claim or lien acquired in any proceedings upon such judgment."

While this section by its language seems to apply solely to liens upon real property filed pursuant to the provisions of section 3, I cannot avoid the conclusion that it was intended to apply to liens against public funds as well. The whole scheme of the Lien Law is based upon the idea of giving the laborer and materialman the first liens upon improvements made by their labor or property.

The statutory provisions for the protection of parties who perform work upon, or furnish material for a public improvement, are just as sacred and entitled to just as much protection and con-

sideration as those contributing to the construction of private property. While a close and narrow construction of section 13 might exclude lienors under section 5, for labor performed or material furnished toward the construction of a public improvement, I am inclined to follow the rule laid down in section 23 of the same act which reads in part as follows: "This article is to be construed liberally to secure the beneficial interests and purposes thereof."

I do therefore hold that a lien or assignment of a contract when made as provided in the Lien Law, will take preference and priority over the lien of a judgment recovered upon a debt against the contractor which was not for material furnished or labor performed.

There is still another phase of this subject that is entitled to consideration. The attempted levy under the judgment of the United States Radiator Corporation is not sufficient to hold the funds as against subsequent liens of laborers or materialmen, or assignees of the contract. An actual levy upon personal property is necessary to bind and hold the property.

To constitute a valid levy upon personal property, the goods or property must be present and subject to the control of the officer. It is not necessary that he should always take manual possession of the property, but there must be an open assertion of right by virtue of the process in respect to goods within his power, or there must be an acknowledgment or claim by the judgment debtor of his title to the property levied upon and the act of levy must be fully asserted and understood. *Baker v. Binninger*, 14 N. Y. 270; *Green v. Burke*, 23 Wend. 490, and numerous other cases.

Assuming that there had been no lien perfected or assignment of the moneys due upon the contract made by P. F. Kenny Company on December 24, 1917, at the time of the alleged levy by the sheriff under the execution, it did not create a lien against the funds held for the public improvement. The money was not in the hands of the Comptroller upon whom the notice of levy was served. The balance of the money remaining unpaid upon the

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contract was not and could not have been seized or taken possession of by the sheriff, and the most that can be said for the attempted levy is that the Comptroller was notified of an outstanding judgment against the contractor and that the sheriff held an execution for its collection.

The judgment creditor has a remedy under article 6 of the General Corporation Law for sequestration of the property of the P. F. Kenny Company, a corporation, but he did not obtain a lien upon the funds in the State treasury appropriated for the work mentioned in the contract hereinbefore stated.

I am therefore of the opinion that the notice of levy served upon the Comptroller by the sheriff of Albany county under an execution issued upon the judgment of the United States Radiator Corporation against P. F. Kenny Company should not be recognized by the Comptroller in the adjustment of claims against the funds applicable to the payment of the work mentioned in the contract between the State and P. F. Kenny Company relating to the plumbing and drainage at Yonkers armory.

In the Matter of Construing the SELECTIVE SERVICE REGULATIONS, SECTION 78, MARINERS, as to Whether a Helper on a Boat Used Within the Three Mile Limit is Within the Provisions of said Section

(Opinion dated February 23, 1918)

A helper on a boat used within the three mile limit is not a "mariner."

A registrant under the Selective Service Regulations was a deck hand and fisherman employed on a boat on Peconic bay. His duties consisted of casting nets and doing general work on the boat. The question involved is as to whether such a registrant is entitled to classification in class IV b as a mariner actually employed in sea service of citizen or merchant in the United States. From the facts adduced in the record it seems that unless the employment of the registrant is similar to that of the deep sea fishermen, and very different from that of the ordinary servant ashore, he should not be treated as a "mariner in the sea service" any more than would the boat black on a Coney Island excursion boat.

Brig-Gen. Charles H. Sherrill, the Adjutant-General, submitted an inquiry, together with a request for an opinion thereon, as to whether a certain registrant is entitled to classification in class IV b, as a mariner actually employed in sea service of citizen or merchant in the United States. The registrant was a deckhand and fisherman employed on a boat on Peconic bay. His duties consisted of casting nets and doing general work on the boat.

LEWIS, Attorney-General.—A member of the legal advisory board attached to the local board having jurisdiction of the case is quoted as stating that the uniform decisions of the Federal courts were to the effect that such a man as the registrant is a mariner.

I do not think that the conclusion arrived at by the associate member of the local advisory board referred to is justified by the reported opinions of the Federal courts. I find a great number of opinions in Federal courts in which the term "mariner" and the term "seaman" are defined for the purpose of determining whether a court of admiralty can take jurisdiction of a proceeding *in rem* for the collection of wages. These authorities are almost uniform in holding that almost anybody who works on any boat which plies upon tidal waters may libel the ship for wages. The persons held to be mariners include the ship's officers, purser, cook (male or female), steward, stewardess, porter, engineer, coal passer, etc., and the boats subject to libel in these actions include everything from steamers to pile drivers and dredges. I do not think, however, that the fact that a man is a "seaman" for the purpose of enforcing his claim for wages in admiralty should be held to render him a "mariner actually employed in sea service of citizen or merchant in the United States." In other words, I do not think that the authorities referred to are in point in the construction of the selective service regulations. (The authorities may be found in the Century Digest under the title "Seaman," § 1, and in the Key Number digests under "Seaman," § 2.)

Another class of cases construes the meaning of various statutes providing that nuncupative wills are valid when made by

mariners while at sea. These authorities seem to be to the effect that a nuncupative will made by a ship's employee while in a foreign port will be valid, but that such a will would not be valid if made while the ship were lying alongside in its home port. There are also decisions to the effect that nuncupative wills are not valid if made in the Mississippi river, in the Schuylkill river, etc. These cases do not seem to me to be much more in point than the first mentioned class, nor to be of any assistance in determining one way or the other upon the interpretation of the selective service regulations.

There is a third class of cases, however, which is absolutely unquestionable authority. This is the class of cases interpreting statutes exempting from military duty "all mariners actually employed in sea service of any citizen or merchant within the United States." I have been unable to find any Federal court decisions upon such statutes, but in the absence of them I regard the decisions of the Supreme Judicial Court of Massachusetts and the Supreme Court of Judicature of New York to be controlling.

In the early part of the nineteenth century there were Federal statutes and statutes in Massachusetts and New York requiring the performance of militia duty and exempting mariners in actual sea service. Several cases arose in Massachusetts where fishermen claimed exemption and the courts granted the exemption on the basis that fishermen should be considered as seamen or mariners, but the fishermen in these cases were deep sea fishermen who signed articles in the nature of shipping papers, and who became, under the Federal statutes with respect to fishermen, entitled to the same rights and subject to the same liability as seamen in the merchant service; for example, in the right to medical treatment, lime juice rations, provisions, prohibition of payment of wages in advance, liability to penalties and forfeitures for breach of discipline and punishment for desertion. It is to be noted that the Federal statutes under which these fishermen signed shipping articles only applied to boats of twenty tons and up, engaged in sea fishing—the cod fishers of the banks and the mackerel fishers of the coast—and are still upon the statute books. See U. S.

R. S., § 4301ff. The reason for exempting mariners and fishermen was explained in these early Massachusetts cases by the fact that those men subjected themselves to special duties and would become liable to the penalties by fine and imprisonment for failure to attend to those duties as agreed. Reporting for militia duty would be likely to cause absence from the other duties. As the court said in *Commonwealth v. Douglas*: "If, therefore, any of the fishermen, thus engaged, should remain and train, when the vessel was about to sail, they would be liable as deserters." 17 Mass. 49-51. See, also, *Bayley v. Merritt*, 2 Pick. 597. These cases, as pointed out, were cases of fishermen in the deep sea fishing business.

Another class of cases in the Massachusetts courts is exemplified in the case of *Pratt v. Hall*, 4 Mass. 239. Pratt, on being fined for failure to do military duty, pleaded that he was a mariner actually employed in the sea service of a citizen or merchant of the United States. In support of his claim to this exemption, he proved that he was master of a certain sloop of eighteen tons burden and had paid hospital money, as a mariner, to the collector of the customs in Boston, and that the sloop was duly licensed to carry on the coasting trade and was actually and generally employed in transporting building material from and to the islands in the harbor of Boston, never going outside of the lighthouse. The court held that Pratt was a lighterman and not a mariner employed in sea service.

In the case of *Commonwealth v. Newcomb*, 14 Mass. 394, the master of the enrolled vessel employed in transporting stones from one part of Boston bay to another, and occasionally making a short trip to sea for the purpose of fishing, was held not to be exempt from military duty as a mariner in the sea service. The entire opinion is interesting, so I have quoted it in full.

"Parker, C. J. The provision, under which the respondent claims an exemption from duty under the militia laws of the United States and of this commonwealth, is thus expressed: 'all mariners actually employed in the sea service of any citizen or merchant within the United States.' He claims to be such a

mariner, on the ground that he is master of a vessel or lighter of thirty-three tons, enrolled and licensed, and as having paid hospital money.

"The exemption is to be determined by the occupation of the person claiming to be a mariner, and not by the character of the vessel; for a small vessel may be enrolled, and hospital money may be paid for the very purpose of evading militia duty.

"It appears that the respondent was not employed in the sea service, but only in the transportation of stones, etc., from one part of the same district to another. There is no difference in principle between this case and that of *Pratt v. Hall*. For the difference in the size of the vessel, and the increased distance of transportation, cannot give an exemption, where the nature of the business is the same, and where it is not necessary to go beyond the bay, or out of the reach of common law jurisdiction, to pursue that business.

"The case of fishermen would seem to require the exemption much more than those who are employed, like the respondent, in transporting stones from one river or inlet to another within the same bay; for the former are constantly upon the water, and cannot so well calculate their business on shore as the latter. But the Legislature has refused this exemption to fishermen. For, by the statute of 1814, c. 63, they repealed the statute of 1810, c. 111, which secured this privilege to fishermen, considering them not as mariners employed in the sea service. Those fishermen who are employed in the bank fishery are probably to be considered as mariners, while actually engaged therein. But there seems to be no reason why the master of a small vessel, plying from Braintree or Weymouth to Boston, should be exempt, which would not in a great measure apply as well to teamsters who should carry on the same business in wagons and carts."

In the courts of New York the decisions were similar. In *Brush v. Bogardus*, 8 Johns. 157, it was held that the master of a sloop sailing on the Hudson river between Poughkeepsie and New York, enrolled as a coasting vessel and sailing under a license, is not a mariner in the sea service and exempt from militia duty.

As pointed out in the Massachusetts cases, the reason for exemption of mariners is that they have undertaken other obligations, the failure to perform which will render them liable to punishment by fine and imprisonment. This is true also of the Grand Banks fishermen, but it is not true of a deckhand and fisherman in a cat-boat upon Peconic bay, who probably seldom, if ever, passes out of the three-mile limit, and most likely spends most of his nights at home ashore. The arrangements of the registrant in question with his employer are probably similar to the arrangements which the employer might make with a teamster ashore and in no way similar to those made between seamen and masters of vessels in the foreign or deep sea trade, or in the coast trade.

I have not before me the full facts with respect to this man's employment, but it seems to me that unless his employment is similar to that of the deep sea fishermen, and very different from that of the ordinary servant ashore, he should not be treated as a "mariner in the sea service" any more than would be the boot-black on a Coney island excursion boat.

In the Matter of Construing the ELECTION LAW as to Expenses of Local Election Boards

(Opinion dated February 25, 1918)

Limit of expenditure by a board of elections in a county having a population of less than ninety thousand and which does not contain within its boundaries at least three cities of the third class.

In the county of Cayuga it has been found necessary to expend \$200 for extra help in tabulating and correcting the enrollment and preparing the same for distribution within statutory time. The question presented is whether the election board had authority to employ such additional assistance and make the expense thereof a county charge. Under the provisions of section 197 of the Election Law every board of elections is given certain powers including the right to fix salaries but not in excess of the amounts specified in section 190 of that law, except that in a county having a population of less than 90,000 the board may have one clerk only and his salary shall not exceed \$900 per annum, nor shall the aggregate expenditures for such clerk hire and for a stenographer exceed the amount specified in section 190. In certain counties among which, by reason of its number of cities and population, Cayuga county

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is, the salary of a commissioner shall not exceed \$1,000 and the expenditure for clerk hire, including stenographer, each year, \$1,500. Cayuga county having thus a limit of \$1,500 has left \$600 after the payment of \$900 for the salary of the clerk of the board. The \$600 excess is the only amount available for the payment of additional help. This provision is mandatory and local boards have no authority beyond that given by statute. It is possible, had the expenditures of the election board been previously fixed, that the board of supervisors, under subdivision 5 of section 12 of the County Law, would have power and authority to employ additional assistants, but in the present case the county treasurer of Cayuga county is not authorized to pay any amount in excess of \$1,500 in any one year for clerk hire or additional assistants, unless it is provided for by previous action of the board of supervisors.

Hon. Frederick L. Marshall, Superintendent of Elections, submitted an inquiry, together with a request for an opinion thereon, as to whether the board of elections of the county of Cayuga has the right to employ a stenographer and clerical assistance at an expense to the county in excess of \$1,500 per year.

Lewis, Attorney-General.—It has been found necessary by the board of elections of the county of Cayuga to employ extra help in tabulating and correcting enrollment and preparing the same for distribution within the time provided by statute. Bills to the amount of \$200 have been rendered against the county for such extra help and the question is now presented whether the election board had the authority to employ such extra assistance and make the expense thereof a charge against the county.

Section 197 of the Election Law, relating to the employment of clerks, assistants and stenographers by the boards of elections, reads as follows:

“§ 197. *Appointment of employees.* Every board of elections shall have power to fix the number, salaries, duties and rank of its chief clerks, clerks, assistant clerks and stenographers and to appoint and remove at pleasure and to fix the salaries of all employees of said board, but not in excess of the amounts specified in section one hundred and ninety; except that in a county having a population of less than ninety thousand the board may have one clerk only and his salary shall not exceed nine hundred

dollars per annum, nor shall the aggregate expenditure for such clerk hire and for stenographer exceed the amount specified in section one hundred and ninety."

That part of section 190 above referred to which applies to Cayuga county reads as follows: "In each county having a population of less than ninety thousand and which does not contain within its boundaries at least three cities of the third class the salary of a commissioner shall not exceed one thousand dollars, and the expenditure for clerk hire, including stenographer, each year, shall not exceed fifteen hundred dollars."

Cayuga county has a population of less than ninety thousand and contains within its boundaries but one third class city. The above provisions are definite and certain and the limitation of \$1,500 for clerk hire and stenographer is clear and distinct. I am unable to find any other section or provision of law which permits an enlargement of the authority of the local board to incur obligations, which would be binding upon the county, above the amount specified.

It will be noted by section 197, above quoted, that in a county having a population of less than 90,000 the board is limited to one clerk whose salary cannot exceed \$900. This leaves \$600 for the employment of additional clerk and stenographer's services. The provision is mandatory. The local boards have no authority in excess of that given them by statute. Their powers and duties cannot be enlarged or extended by implication. If they have authority to exceed the statutory limitation by \$200 it could be extended to \$2,000 or any other amount which such boards should conceive it necessary to use for extra help.

There is no intimation in the letter of inquiry that the board of supervisors has provided for extra help in the office of the board of elections in the county of Cayuga, or fixed the salaries of additional employees. It is stated that extra help has been employed in previous years and the services paid for by the county, but this simply amounted to a ratification by the board of supervisors of the action of the election board, so far as it related to service previously rendered, but cannot be tortured

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into an authorization for future employment of additional assistants or the fixing of salaries for extra clerks.

It is possible that the board of supervisors of Cayuga county would have the power and authority, under subdivision 5 of section 12 of the County Law, to employ additional assistants and obligate the county to pay a greater amount than that mentioned in section 197 of the Election Law, and, under the dictum laid down in *People ex rel. Simpson v. Snyder*, 173 App. Div. 171, the board of supervisors would have the right to fix the salaries of such clerks and employees at different amounts than those fixed by the election board, and the rates so fixed by the board of supervisors would prevail over the rates established by the boards of elections for the clerks and assistants employed by them. This would only apply to salaries of such clerks and assistants as were fixed by the board of supervisors in advance of the rendition of the services, otherwise the boards of elections have authority, under the limitations contained in section 197 of the Election Law, to fix the salaries of all clerks, stenographers and employees of such boards.

I am, therefore, of the opinion that the county treasurer of Cayuga county is not authorized to pay any amount in excess of \$1,500 in any one year for clerk hire, stenographer and additional assistants, unless it is provided for by previous action of the board of supervisors.

In the Matter of Construing the HIGHWAY LAW, SECTION 285,
Relative to Foreign Motor Vehicles Used Within this State

(Opinion dated February 26, 1918)

The mere running of a motor vehicle into the State for the purpose of making delivery of goods purchased in an adjoining State for delivery in this State does not constitute "doing business within this state" within the meaning of section 285 of the Highway Law.

Section 285 of the Highway Law provides that the requirements for registration of automobiles used in this State shall not apply to vehicles registered in other States, which shall be exempt to the same extent that the States of their registration exempt New York cars. The exemp-

tion, however, only applies to "a motor vehicle owned by a nonresident of this state, other than a foreign corporation doing business in this state," etc. The intention of the Legislature was obviously to exclude from the exemption the cars of such corporations and to require them to be registered and licensed in New York even though they might be already registered and licensed in the State of the owner's domicile. A foreign corporation doing business in this State in violation of section 15 of the General Corporation Law is just as much prohibited by the Highway Law from running unlicensed automobiles in this State as is a foreign corporation which complies with the said section of the General Corporation Law. The courts have repeatedly held that shipping goods into New York State pursuant to orders received in another State does not constitute "doing business within the state." *Held*, that the Secretary of State would be quite justified in advising his inspectors that foreign corporations not licensed to do business within the State will not be presumed to be doing business within the State by the mere fact that they occasionally send their motor cars across the boundary and that in such crossing of the boundary they are not necessarily "doing business within the state."

Hon. Francis M. Hugo, Secretary of State, submitted an inquiry, together with a request for an opinion thereon, as to how the phrase "other than a foreign corporation doing business in this state" as used in section 285 of the Highway Law, should be construed in enforcing that and the preceding sections.

LEWIS, Attorney-General.—Sections 282, 283, 284, 2884-a of the Highway Law require the registration of all automobiles used in the State, and fix the fees for such registration. Section 285 provides that the requirements for registration shall not apply to vehicles registered in other States, which shall be exempt to the extent that the States of their registration exempt New York cars. The exemption, however, is restricted to "a motor vehicle owned by a non-resident of this State, *other than a foreign corporation doing business in this State*," etc. It was clearly the intention of the Legislature to exclude from the exemption the cars of foreign corporations actually doing business in this State and to require such cars to be registered and licensed in New York, even though they might be already registered and licensed in the State of domicile of the owner. The suggestion has been made that the phrase "a foreign corporation doing business in this State" as here used means only a foreign corporation *duly licensed to do*

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business in the State. To this I cannot agree. The Legislature in enacting section 15 of the General Corporation Law, prohibits foreign stock corporations from "doing business in this State," but recognizes that the prohibition is sometimes violated, by imposing a penalty in the form of a provision that no foreign corporation doing business in this State shall maintain any action in this State upon any contract made by it in this State unless prior to the making of the contract it shall have filed its papers and procured a certificate of authority to do business in the State.

I think that a foreign corporation which does business within this State in violation of section 15 of the General Corporation Law is just as much prohibited by the Highway Law from running unlicensed automobiles in this State as is a foreign corporation which complies with section 15 of the General Corporation Law.

This brings us to the question of what constitutes "doing business within this State." The decisions of the courts upon the meaning of this phrase, as used in the General Corporation Law, are legion. They hold that the prohibition against foreign corporations "doing business within this State" should be construed as preventing foreign corporations from entering the State and there engaging in the general prosecution of their business without first obtaining the requisite certificate, but that the prohibition of all corporate transactions by foreign corporations, irrespective of their nature, was not intended.

In *Penn Collieries Co. v. McKeever*, 183 N. Y. 98, the court said: "To be doing business in this state implies corporate continuity of conduct in that respect; such as might be evidenced by the investment of capital here, with the maintenance of an office for the transaction of its business, and those incidental circumstances, which attest the corporate intent to avail itself of the privilege to carry on a business." In order to constitute doing business in the State, there must be more than an occasional transaction. *Brown Seed Co. v. Richardson*, 53 Misc. Rep. 517.

The courts also hold that shipping goods into New York, pursuant to orders received in another State, does not constitute "doing business within the State." *Hovey v. De Long, etc., Co.*,

211 N. Y. 420. This is true even where the foreign corporation maintains in the State offices where its wares may be demonstrated, if the samples are not sold and all orders are transmitted to the home office of the corporation without the State for acceptance. *Burrowes Co. v. Chaplin*, 127 App. Div. 317. Sales by foreign corporations in New York, through brokers or commission merchants, do not constitute doing business in the State (*Brookford Mills v. Baldwin*, 154 App. Div. 553), and delivery of goods so sold, within the State of New York, being merely an incident to the transaction, is not "doing business within the State."

This being the state of the authorities, I think the Secretary of State would be quite justified in advising his inspectors that foreign corporations not licensed to do business within the State will not be presumed to be doing business within the State by the mere fact that they occasionally send their motor cars across the boundary. Such corporations should be treated by those inspectors as not "doing business within the State," in the absence of evidence that they are *regularly* transacting business within the State, other than the mere filling of orders received elsewhere.

IN the Matter of Construing the CONSTITUTION OF THE STATE OF NEW YORK, ARTICLE II, SECTION 1, as to the Right of Women to Vote at a Village Election and to Hold a Village Office

(Opinion dated February 28, 1918)

Women are entitled to vote at a village election and eligible to hold a village office.

The two questions herein determined are whether a woman is qualified to vote at a village election and whether she is eligible to hold a village office. The amendment of the State Constitution adopted in 1917 conferring equal suffrage upon women went into effect January 1, 1918. As it now reads the Constitution provides that every citizen of the age of twenty-one years who shall have been a citizen for ninety days, an inhabitant of the State for one year next preceding an election, a resident of the county for four months last preceding an election and for the last thirty days a resident of the election district in which he or she may offer his or her vote, shall be entitled to vote at such election in the election district of his or her residence and not elsewhere, for all officers

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that are now or hereafter may be elective by the people, and upon all questions submitted to the vote of the people, provided, however, that a citizen by marriage shall have been an inhabitant of the United States for five years, and provided that in time of war no elector in the actual military service of the State or of the United States, in the army or navy thereof, shall be deprived of his or her vote by reason of his or her absence from such election district. The Legislature shall have power to provide as to the manner in which and the time and place at which such absent electors may vote, and for the return and canvass of their votes in the election districts in which they respectively reside. *Held*, that the amendment to article II, section 1, of the Constitution conferring equal suffrage upon women removed the sex disability, and all women having the necessary qualifications of a voter, as prescribed by section 162 of the Election Law and section 41 of the Village Law, are duly qualified voters and entitled to vote at all village elections; that the amendment to article II, section 1, of the Constitution also carries with it the right of women to hold office and that any woman possessing the necessary requirements may, under section 42 of the Village Law, hold any village office.

John S. Van Orden, Village Clerk of Spring Valley, N. Y., submitted inquiries, together with a request for an opinion thereon, as follows:

- "1. Is a woman qualified to vote at a village election?
- "2. Is a woman eligible to hold a village office?"

LEWIS, Attorney-General.—At the annual election held on November 6, 1917, the voters of the State of New York adopted an amendment to article II, section 1, of the Constitution, conferring equal suffrage upon women, which amendment took effect on January 1, 1918, and reads as follows:

"Section 1. Every citizen of the age of twenty-one years, who shall have been a citizen for ninety days, and an inhabitant of this state one year next preceding an election, and for the last four months a resident of the county and for the last thirty days a resident of the election district in which he or she may offer his or her vote, shall be entitled to vote at such election in the election district of which he or she shall at the time be a resident, and not elsewhere, for all officers that now are or hereafter may be elective by the people, and upon all questions which may be submitted to the vote of the people, provided, however, that a citizen by marriage

shall have been an inhabitant of the United States for five years; and provided that in time of war no elector in the actual military service of the state, or of the United States, in the army or navy thereof, shall be deprived of his or her vote by reason of his or her absence from such election district; and the legislature shall have power to provide the manner in which and the time and place at which such absent electors may vote, and for the return and canvass of their votes in the election districts in which they respectively reside."

Under such amendment all women in the State possessing the requisite qualifications of a voter became duly qualified voters.

The general qualifications of a voter are prescribed by section 162 of the Election Law, and require that such person must be a citizen of the United States, twenty-one years of age, an inhabitant of the State for one year next preceding the election, and for the last four months a resident of the county, and for the last thirty days a resident of the election district, and, if a naturalized citizen, such voter must have been naturalized at least ninety days prior to the day of election. Said section 162 of the Election Law further states that such qualified voter "is a male citizen," and this has led to a belief that women were not qualified to vote until such section 162 is amended, eliminating the word "male." This is not necessary for the reason that the amendment to article II, section 1, of the Constitution supersedes section 162 of the Election Law. The masculine term "he" is also used in said section 162, which has given rise to the assumption that women were not qualified until said section of the Election Law is amended. An amendment in this respect is unnecessary for the reason that section 22 of the General Construction Law states that wherever the masculine is used it includes the feminine.

The qualifications of voters at village elections are governed by section 41 of the Village Law, as follows:

"1. To entitle him to vote for an officer, he must be qualified to vote at a town meeting of the town in which he resides, and must have resided in the village thirty days next preceding such election.

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"2. To entitle him to vote upon a proposition, he must be entitled to vote for an officer, and he must also be the owner of property in the village assessed upon the last preceding assessment-roll thereof. A woman who possesses the qualifications to vote for village officers, except the qualifications of sex, who is the owner of property in the village assessed upon the last preceding assessment-roll thereof, is entitled to vote upon a proposition to raise money by tax or assessment, or for the dissolution or change of name of the village or for the borrowing of money upon the bonds or other obligations of the village, payable in future fiscal years for the purpose of purchasing, constructing and maintaining the village improvements specified in section one hundred and twenty-eight."

To vote for officers at a village election, a person must possess the qualifications set forth in section 162 of the Election Law; but to vote upon a proposition such voter must possess the additional qualification of being the owner of property in the village assessed upon the last preceding assessment-roll thereof.

No registration of voters is required in a village election except where, pursuant to section 51-a of the Village Law, the voters have adopted a proposition requiring the registration of voters. And if such registration is required the inspectors of election of each election district of such village shall meet on the tenth day preceding each village election for the purpose of preparing a register for such election. Therefore, if registration is required women may appear on registration day and register.

The amendment to article II, section 1, of the Constitution, conferring equal suffrage upon women, removed the sex disability; and all women having the necessary qualifications of a voter, as prescribed by section 162 of the Election Law and section 41 of the Village Law, are duly qualified voters and entitled to vote at village elections.

The amendment to article II, section 1, of the Constitution carries with it the right of women to hold office. And any woman possessing the necessary requirements, under section 42 of the Village Law, is eligible to hold any village office.

**In the Matter of Construing the CONSTITUTION OF THE STATE OF
NEW YORK, ARTICLE II, SECTION 1, Relative to the Right of
Women to Sign City Local Option Petitions and to Vote at
Municipal Local Option Elections**

(Opinion dated February 28, 1918)

Women possessing the qualifications of voters are entitled to sign the city local option petition and qualified to vote at a city local option election.

By the adoption of the amendment to article II, section 1 of the State Constitution all women possessing the requisite qualifications of a voter became duly qualified voters. The general qualifications of a voter are prescribed by section 162 of the Election Law. These specific qualifications are detailed in the opinion. An alien woman who becomes a citizen by marriage must not only possess the qualifications prescribed in section 162 of the Election Law but she also must have been a resident of the United States for five years next preceding the election at which she votes. Under section 7 of the City Local Option Law the petition for the submission of any of the questions under that chapter shall be signed by qualified electors of the city to the number of 25 per centum of the votes cast in the city at the preceding general election. Women under the amendment of the Constitution, article II, section 1, having the legal right to vote are qualified electors and entitled to sign such petition, and are equally entitled with men to circulate such petition. Under the provisions of chapter 7, Laws of 1918, section 151-a was added to the Election Law, providing for additional days of registration for special elections in the year 1918, and under section 160 of the Election Law the method of revising the election register is given in detail. Under these provisions of law for the revision and correction of the register all women who possess the requisite qualifications of a voter may appear before the board of registration and have their names placed upon the registry of voters. *Held*, that women are duly qualified electors and are entitled to sign the petition for the submission of local option questions in cities and are eligible to vote at such city local option elections.

C. A. Dayton, City Clerk of Auburn, N. Y., submitted an inquiry, together with a request for an opinion thereon, as follows:

“Can a woman, possessing the qualifications of a voter, sign the city local option petition and vote at the city local option election?”

LEWIS, Attorney-General.—At the annual election held on November 6, 1917, the voters of the State of New York adopted an amendment to article II, section 1, of the Constitution, conferring equal suffrage upon women, which amendment took effect on January 1, 1918, and reads as follows:

“SECTION 1. Every citizen of the age of twenty-one years, who shall have been a citizen for ninety days, and an inhabitant of this state one year next preceding an election, and for the last four months a resident of the county and for the last thirty days a resident of the election district in which he or she may offer his or her vote, shall be entitled to vote at such election in the election district of which he or she shall at the time be a resident, and not elsewhere, for all officers that are now or hereafter may be elective by the people, and upon all questions which may be submitted to the vote of the people, provided, however, that a citizen by marriage shall have been an inhabitant of the United States for five years; and provided that in time of war no elector in the actual military service of the state, or of the United States, in the army or navy thereof, shall be deprived of his or her vote by reason of his or her absence from such election district; and the legislature shall have power to provide the manner in which and the time and place at which such absent electors may vote, and for the return and canvass of their votes in the election districts in which they respectively reside.”

Under such amendment all women in the State possessing the requisite qualifications of a voter became duly qualified voters.

The general qualifications of a voter are prescribed by section 162 of the Election Law, and require that such person must be a citizen of the United States, twenty-one years of age, an inhabitant of the State for one year next preceding the election, and for the last four months a resident of the county, and for the last thirty days a resident of the election district, and, if a naturalized citizen, such voter must have been naturalized at least ninety days prior to the day of election. Said section 162 of the Election Law further states that such qualified voter “is a male citizen,” and this has led to a belief that women were not

qualified to vote until such section 162 is amended, eliminating the word "male." This is not necessary for the reason that the amendment to article II, section 1, of the Constitution supersedes section 162 of the Election Law. The masculine term "he" is also used in said section 162, which has given rise to the assumption that women were not qualified until said section of the Election Law is amended. An amendment in this respect is unnecessary for the reason that section 22 of the General Construction Law states that wherever the masculine is used it includes the feminine.

An alien woman who becomes a citizen by marriage must not only possess the qualifications prescribed in section 162 of the Election Law, but she must also have been a resident of the United States for five years next preceding the election at which she votes.

Section 7 of the City Local Option Law directs that "The petition for the submission of any of the questions under this chapter shall be signed by qualified electors of the city to the number of twenty-five per centum of the votes cast in the city at the preceding general election."

An elector is a person who has a legal right to vote and upon such elector complying with the requirements of the Election Law in relation to registration he or she becomes a duly qualified voter. Women, pursuant to article II, section 1, of the Constitution, are vested with the legal right to vote and are, therefore, qualified electors and entitled to sign such petition and are equally entitled with men to circulate such petition.

The basis for the computation of the number of signatures necessary to a city local option petition is not made on the vote cast for any particular office at the last preceding election, but must be made from a computation of the total number of votes cast in each election district at the last preceding election, which will include not only all the votes cast for candidates for a certain office but also the void, protested and blank ballots.

The qualifications of a voter at a city local option election are set forth in section 13 of the City Local Option Law, as follows:

"Any registered elector who would be qualified to vote for city officers, if such officers were to be then elected, shall be qualified to vote upon such local option questions. For the purpose of ascertaining such electors, the registers of electors in the city prepared on the last preceding day of registration shall be used after revision and correction on the second Saturday preceding the election, in the manner provided in the election law."

The revision and correction of the register referred to herein is accomplished pursuant to sections 151 and 160 of the Election Law. Section 151 provides: "If a special election be called by the governor or a special or other election be appointed by or pursuant to law for a time other than the day of general election, the inspectors of election of the various election districts in the political subdivision for which such special or other election is to be held shall meet in their respective districts on the second Saturday preceding such election, from eight o'clock in the forenoon to ten o'clock in the evening, for the purpose of revising and correcting the register of voters as provided in this article."

By chapter 7 of the Laws of 1918, section 151-a was added to the Election Law providing for additional days of registration for special elections in the year 1918, and directs that "such meetings shall be held, respectively, on the second Friday and second Saturday before the election."

The duties of the board of registration for the purpose of revising and correcting such register are set forth in section 160 of the Election Law, and in substance are: that the inspectors shall retain upon the register the names of all persons qualified to vote at such election which appear upon the register of electors for the last preceding general election. They shall strike from such register the names of such electors as are proven to the satisfaction of the inspectors to have ceased to be electors of such district since their names were placed upon the register, and they shall add to such register the names of all persons qualified as electors who shall personally appear for registration. Under these provisions of law for the revision and correction of the register, all women who possess the requisite qualifications of a voter may

appear before the board of registration and have their names placed upon the registry of voters.

After such registration women will have complied with all the necessary requirements under the law, and will be duly qualified to vote upon such local option questions.

I therefore hold that women are duly qualified electors and are entitled to sign the petition for the submission of local option questions in cities, and are eligible to vote at such city local option elections.

In the Matter of Construing the MILITARY LAW, SECTION 245, as to Deducting Family Allowances Paid by the United States to Dependents of Enlisted Men in Accordance with the Provisions of the War Risk Insurance Law of the United States as Part of the Compensation Paid to Such Enlisted Men for the Performance of Military Duty

(Opinion dated March 8, 1918)

Under the Federal War Risk Insurance Law family allowances should not be deducted in computing the excess of civil compensation over military compensation under section 245 of the Military Law of the State of New York, as amended by chapter 435 of the Laws of 1917.

Officers and employees of the State and its municipal corporations and political subdivisions entering the Federal military, naval or marine service under stated conditions while in the performance of duty in such service are granted, by section 245 of the Military Law, as amended by chapter 435 of the Laws of 1917, such part of his salary or compensation as such officer or employee as equals the excess, if any, of such salary or compensation over the compensation paid to him for the performance of such duty to the extent of not less than twenty-five dollars a month. Under the War Risk Insurance Law of the United States, which went into effect October 6, 1917, article II provides that enlisted men with wives or children must allot certain amounts, and may allot greater amounts, and enlisted men with other dependents may allot certain amounts of their military pay to such persons, and the United States will then pay to the dependents of the enlisted men certain monthly allowances. Are such allowances paid to dependents of an enlisted man to be considered part of the compensation paid to him for military duty? It can hardly be said that they are compensation paid to him for the performance of such military duty as they are not

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paid to him, nor are they compensation for the performance of military duty, not being in any way based upon the quantity or quality of duty performed. The payment to the man of the difference between his civil salary or compensation and the compensation paid to him for military service operates whether he is single or married, supporting a family or supported by one, and section 245 of the Military Law contains nothing to indicate that it was passed for the benefit of anybody but the man himself. *Held*, that in interpreting the Military Law we should not consider family allowances as part of the compensation paid to a man for military service, and should not deduct them in computing the excess of civil over military pay.

Hon. William P. Burr, Corporation Counsel, New York city, submitted an inquiry, together with a request for an opinion thereon, as follows:

"Under section 245 of the Military Law, in computing the difference between the civil compensation of a State or municipal officer or employee on military duty and the compensation paid to him for the performance of such duty, should family allowances paid by the United States to dependents of enlisted men, in accordance with the provisions of article II of the War Risk Insurance Law (Act of Congress October 6, 1917), be considered as part of the compensation paid to such enlisted men for the performance of military duty?"

Lewis, Attorney-General.—Section 245 of the Military Law, as amended by chapter 435 of the Laws of 1917, provides, *inter alia*, that officers and employees of the State and its municipal corporations and political subdivisions entering the Federal military, naval or marine service under stated conditions, while in the performance of duty in such service "shall receive such part of his salary or compensation as such officer or employee as equals the excess, if any, of such salary or compensation over the compensation paid to him for the performance of such duty" to the extent of not less than twenty-five dollars a month. This act took effect May 10, 1917.

On October 6, 1917, the War Risk Insurance Law of the United States took effect. Article II of that statute provides that enlisted men with wives or children must allot certain amounts,

and may allot greater amounts, and enlisted men with other dependents may allot certain amounts of their military pay to such persons, and it goes on to provide that in cases where allotments have been made, the United States will pay to the dependents of the enlisted men certain monthly allowances — if there be a wife but no child, fifteen dollars; if there be a wife and one child, twenty-five dollars, etc., etc. In cases where allotments are voluntary, the allowances are only made if and while the enlisted man makes an allotment. The amounts of family allowances are fixed by the number, relationship and condition of the dependents, the amount of voluntary allotment made them by the enlisted man and his habits with respect to their support prior to his enlistment. They do not depend upon the rank or grade of the enlisted man, the amount of his military pay nor the extent of the services he renders or is expected to render.

The question is whether family allowances paid to the dependents of an enlisted man should be regarded as part of the "compensation paid to him" for military duty.

While it might be said that the family allowances, paid to dependents, are compensation to them for the absence of the man who ordinarily supported them, it can hardly be said that they are "compensation paid to him for the performance of such [military] duty." The allowances are not *paid to him*, nor are they compensation for the performance of military duty, not being in any way based on the quantity or quality of the duty performed.

The amount of military compensation paid a man depends on his rank, the nature of his duties, and the place where he is required to perform them. A man holding a higher rank or performing more important duties or fighting in foreign lands receives higher pay than another not so ranked or detailed. The amount of the compensation is directly related to the value of the services rendered or the risk incurred. A soldier's pay is governed by what he *does* — and it does not vary by reason of his marital status, the number of his children or dependent rela-

tives, nor their financial condition. In the payment of soldiers we find the elements of *quid pro quo* and *quantum meruit*.

The family allowances however contain neither the element of *quid pro quo* (to the soldier) nor that of *quantum meruit*. They have nothing to do with the value of the services rendered or the risk incurred by the soldier, but are based upon purely extrinsic circumstances — the number and relationship of dependents, the degree of their dependency, the amount of voluntary allotment made by the soldier, and his habits before enlistment with respect to their support.

It has been suggested that if I consider family allowance as not part of the compensation paid to the man for military service, I should also exclude so much of the man's pay as he is obliged by the statute to allot to his wife and children. This does not follow. A man's salary is his compensation, even though he may be required by law to pay part of it in alimony to a divorced wife, in support of a child, in settlement of old debts, or in taxes for the maintenance of the government. If a man's dependents should die or become independent during his military service, *they* would cease to draw family allowances, but *he* would continue to earn the same compensation whether permitted to draw it all himself, required to send some of it home, or required to leave half of it on deposit with the government until his discharge.

Section 245 of the Military Law provides for the payment to *the man* of the difference between his civil salary or compensation and the compensation *paid to him* for military service — it operates whether he is single or married, supporting a family or supported by one, and contains nothing to indicate that it was passed for the benefit of anybody but the man himself.

I am satisfied that in interpreting the Military Law we should not consider family allowances as part of the compensation paid to a man for military service and should not deduct them in computing the excess of civil over military pay.

**In the Matter of CONSTRUING THE ELECTION LAW, SECTION 292,
and Title VI, Section 20 of Chapter 751 of the Laws of 1895,
Being an Act to Revise the Charter of the City of Hudson,
Relative to Special Elections**

(Opinion dated March 20, 1918)

Authority of the Governor to call a special election in a ward in the city of Hudson where the general election resulted in a tie vote for alderman of such ward.

A vacancy exists in the office of alderman of the first ward of the city of Hudson as the result of a tie vote at the general election held on November 6, 1917. The question now arises as to whether the Governor has power vested in him to fill such vacancy under the provisions of section 292 of the Election Law. Under title 6, section 20 of the charter of the city of Hudson it is provided that vacancies occurring in any manner in an elective office shall be filled by a special election to be ordered by the common council at its first regular meeting after the occurrence of the vacancy, such election to take place within one month after the order of the common council, except that if such vacancy shall occur within six months before a municipal election the common council shall fill the vacancy instead of ordering a special election. *Held*, that the Governor is authorized, in the situation presented in the city of Hudson, to proclaim a special election to fill the office of alderman in the first ward caused by reason of a tie vote at the general election held on November 6, 1917, and that the power of the common council to order an election is limited to those vacancies enumerated in section 30 of the Public Officers Law, and that the Governor now has, and has had for a period of over seventy years, a well-defined power in instances of this character to call a special election.

Hon. Charles S. Whitman, the Governor, has submitted a statement of facts as follows:

"The common council of the city of Hudson has requested the Governor to call a special election in that city for the election of an alderman in the first ward where there was a failure to elect by reason of a tie vote at the general election held on November 6, 1917."

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Upon this statement of facts the Governor has also submitted an inquiry, together with a request for an opinion thereon, as to his duty and authority to call such special election.

LEWIS, Attorney-General.—The inquiry presents the question to be determined of whether the vacancy occurring in the office of alderman in the first ward of the city of Hudson should be filled pursuant to title 6, section 20 of the city charter, or whether the power is vested in the Governor to fill such vacancy under the provisions of section 292 of the Election Law.

Title 6, section 20, of the city charter provides that: "Vacancies occurring in any manner in any elective office shall be filled by a special election to be ordered by the common council at its first regular meeting after the occurrence of the vacancy: which election shall take place within one month after such order. If, however, such vacancy shall occur within six months before a municipal election, no special election shall be ordered, but the common council shall fill the vacancy until the first day of January next ensuing, if the vacancy shall occur in the year eighteen hundred and ninety-five, and until the first day of May next ensuing, if the vacancy shall occur in any other year, but the person elected to fill a vacancy shall not hold the office longer than the thirty-first day of December next ensuing if the vacancy shall occur in the year eighteen hundred and ninety-five, nor longer than the thirtieth day of April next ensuing, if the vacancy shall occur in any other year. In case of vacancy occurring during the year eighteen hundred and ninety-five the person elected to fill a vacancy shall not hold the office longer than the thirty-first day of December, eighteen hundred and ninety-five. In the case of vacancies during the year eighteen hundred ninety-six the person elected to fill a vacancy shall not hold the office longer than the thirtieth day of April next ensuing."

Section 292 of the Election Law, providing for the filling of vacancies in elective offices, directs that "Upon the failure to elect to any office, except that of governor or lieutenant-governor, at a general or special election, at which such office is authorized

to be filled, or upon the death or disqualification of a person elected to office before the commencement of his official term, or upon the occurrence of a vacancy in any elective office which can not be filled by appointment for a period extending to or beyond the next general election at which a person may be elected thereto, the governor may in his discretion make proclamation of a special election to fill such office, specifying the district or county in which the election is to be held, and the days thereof, which shall be not less than thirty nor more than forty days from the date of the proclamation."

It is my opinion that the Governor is authorized, in the situation presented in the city of Hudson, to proclaim a special election to fill the office of alderman of the first ward caused by reason of a tie vote at the general election held on November 6, 1917. From a reading of title 6, section 20, of the city charter, I am led to the conclusion that the power of the common council to order an election to fill a vacancy is limited to those vacancies enumerated in section 30 of the Public Officers Law, viz., the death of the incumbent; his resignation; his removal from office; his ceasing to be an inhabitant of the State, or, if he be a local officer, of the political subdivision or municipal corporation of which he is required to be a resident when chosen; his conviction of a felony or a crime involving a violation of his oath of office; the judgment of a court declaring void his election or appointment, or that his office is forfeited or vacant; his refusal or neglect to file his official oath or undertaking, if one is required, within the time prescribed by law.

It should be observed that section 292 of the Election Law provides for the filling of vacancies which have occurred because of a failure to elect, to those occurring before the commencement of the term, upon the death or disqualification of the person elected to office, and, lastly, to a vacancy "in any elective office." A vacancy "in any elective office" is a vacancy arising during the term of that office, and the power of the Governor to fill such vacancy is limited to cases where the office "cannot be filled by appointment." If the vacancy had occurred after the beginning

of the term of office, no question would arise as to the power of the common council of the city of Hudson to order a special election to fill such vacancy. This vacancy, however, has occurred from a failure to elect by reason of a tie vote, and clearly comes within the provisions of section 292 of the Election Law empowering the Governor to order a special election.

Also assuming that the common council of the city of Hudson was possessed of the power and authority to call a special election to fill the vacancy in question, pursuant to title 6, section 20, of the city charter, such body is without power at the present time for the reason that such section directs that a vacancy "shall be filled by a special election to be ordered by the common council *at its first regular meeting after the occurrence of the vacancy.*" The first regular meeting of the common council, after the vacancy occurred, having passed, no authority exists in such body to call a special election at this time. The Governor now has, and has had for a period of over seventy years, a well-defined power in instances of this character to call a special election; and even though the common council have the power to call a special election, at its first regular meeting after the occurrence of the vacancy, the omission to exercise that power would be a sufficient reason for the Governor to issue a proclamation for such special election.

I therefore reach the conclusion, for the reasons hereinabove set forth, that the Governor is authorized, in his discretion, under the provisions of section 292 of the Election Law, to proclaim a special election to fill the office of alderman of the first ward of the city of Hudson, where a vacancy exists by reason of a tie vote at the election held on November 6, 1917.

In the Matter of CONSTRUING THE INSURANCE LAW, SECTIONS 70
AND 170, Relative to Surety Companies and Title Companies
Guaranteeing Mortgage Loans

(Opinion dated March 25, 1918)

Surety companies cannot guarantee the repayment of loans secured by a bond and mortgage.

Several surety companies propose to issue a bond to Federal Land Banks in connection with loans to be made by such banks to farmers upon the security of bond and mortgage, and it is proposed to facilitate these loans by having the banks accept as to title an abstract covering twenty-one years last past, approved by the bank's abstractors, and a bond given by the borrower with approved sureties, such bond reciting that in consideration of the premium the surety company guarantees to said bank the repayment of any part of said loan that may, through any defect in the title of the mortgagor to the mortgaged property, be uncollectible from the mortgagor, his heirs or assigns. Under the New York statutes a surety company may guarantee the performance of a contract and when writing the bond herein considered it is this power which the surety companies claim they are exercising.

Held, that the form of bond in question does not guarantee the performance of a contract, the contract of the farmer being to repay the loan, but the surety company does not guarantee in any respect the contract of the borrower to repay such loan. The bond simply indemnifies or insures the bank against loss by reason of a defect of title in the mortgaged premises. The surety company may not undertake the proposed business. Where the hazard is that of title the Legislature has conferred the insurance company business upon title companies to the exclusion of all other insurance companies. Sections 70 and 170 of the Insurance Law.

Hon. Jesse S. Phillips, Superintendent of Insurance, submitted the following statement of facts:

"Several surety companies, as appears from a communication of the Superintendent of Insurance dated February 20, 1918, intend to issue a bond to Federal Land Banks in connection with loans made by such banks to farmers upon the security of bond and mortgage. In order to facilitate these loans by obviating delays due to a complete investigation of the title of the mort-

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gaged premises, an abstract covering twenty-one years last past is to be accepted by the banks after approval by the bank's abstractors and a bond given by the borrower with approved sureties conditioned as follows:

"Now therefore, in consideration of a premium of Dollars, the Surety Company does hereby guarantee to said bank the repayment of any part of said loan that may, in consequence of any defect in the title of the mortgagor to the mortgaged property, be uncollectible from the mortgagor, his heirs or assigns."

Based upon the facts above stated the superintendent also submitted an inquiry, together with a request for an opinion thereon, as to whether the proposed transactions will invade the field of business held by title companies under the statutes, or, more precisely, whether such transactions are or are not title company business *exclusively* under the provisions of the Insurance Law.

LEWIS, Attorney-General.—Under our New York statutes a surety company may be formed for the purpose, among other powers, of "guaranteeing the performance of contracts" (Insurance Law, § 70), and it is this power which the surety companies claim they are exercising when writing the above bond. From a careful analysis of the bond I am at loss to see how it guarantees the performance of a contract. The contract of the farmer is to repay the loan. The proposed surety company bond does not guarantee in any respect the contract of the borrower to repay the loan. The bond in substance simply indemnifies or insures the bank against loss by reason of a defect of title in the mortgaged premises. It is an engagement that the title to the premises mortgaged is good and, if not, the company will pay any loss resulting from defect of title, which, as I shall hereinafter point out, is a policy of title insurance under section 170 of the Insurance Law. Such a bond as the company proposes to write acknowledges and recites the existence of a primary obligation upon the part of the borrower to repay the loan, but does not guarantee the *performance of that obligation* by the borrower.

The business of a title insurance company is thus defined in section 170 of the Insurance Law:

“§ 170. Incorporation. Five or more persons may form a corporation for one of the following purposes:

“1. To examine titles to real property and chattels real, to procure and furnish information in relation thereto, make and guarantee the correctness of searches for all instruments, liens or charges affecting the same, *guarantee or insure the payment of bonds and mortgages, or notes of individuals or partnerships secured by mortgages upon real property situated in this or any other state*, and bonds, notes, debentures and other evidences of indebtedness of solvent corporations secured by deed of trust or mortgage upon real property situated in this or any other state, invest in, purchase and sell, with such guarantee or with guarantee only against loss by reason of defective title or incumbrances, bonds and mortgages, and notes of individuals or partnerships secured by mortgages upon improved and unincumbered real property situated in this or any other state worth fifty per centum more than the amount loaned thereon, and bonds, notes, debentures and other evidences of indebtedness of solvent corporations secured by deed of trust or mortgages upon improved and unincumbered real property situated in this state or outside of this state worth fifty per centum more than the amount loaned thereon, *and guarantee and insure the owners of real property and chattels real and others interested therein against the loss by reason of defective titles thereto and other incumbrances thereon*, which shall be known as a title guaranty corporation;
* * *

The net result effected through the proposed policy to be issued by the surety company to the land bank is the same as if the surety company had under the power last above recited issued a policy of *title insurance* directly to the bank as a party “interested” in real property as mortgagee.

The agreement of the surety company is not a guarantee of the payment of the mortgage by the borrower, for there are no provisions therein contained that the principal or interest of the

mortgage will be paid at all. Rather, as I have before stated, it is a guarantee that the title under the mortgage is good and the agreement might just as well, so far as its efficacy is concerned, have been entered into between the bank and the surety company without the participation of the mortgagor. The hazard is that of title only.

In opposition to these conclusions the surety companies cite the following illustrations of business already done by them:

(1) A man borrows money with which to purchase an automobile and agrees to pay the loan in installments and gives his notes for the deferred payments, these notes being secured by a chattel mortgage upon the automobile. The borrower is required to give a bond conditioned to pay the unpaid installments of the loan in case

(a) He fraudulently absconds with the automobile; or

(b) There is a serious injury to, or destruction of the automobile and its abandonment by him.

This, it is alleged, is a contract of suretyship and is not automobile insurance, even though one of the contingencies under which liability can accrue is the destruction of the automobile and its abandonment.

(2) A man who is about to let to another a factory in which there is a boiler, demands of the lessee a bond with surety conditioned to pay such part of the rent as may be uncollectible in consequence of the destruction of the premises by an explosion of the boiler.

Such a transaction, the surety company asserts, is not boiler insurance. In each of the above instances, the company argues, the bond guarantees to a limited extent the performance of an obligation to pay a sum of money, though in both cases the only contingency under which liability can accrue is a hazard insurable only by other classes of insurance companies.

The difference which I perceive between the cases offered as illustrative by the surety companies and the presently proposed bond to the land banks is that in the illustrations furnished there is an indemnity agreement against failure of the borrower or

the lessee to pay. They are guarantees that a person will do something. On the other hand, the agreement with the land bank does not guarantee that the farmer will do anything. Regardless of whether or not the title is good or bad there is no engagement by the surety company that the farmer will pay the loan or the mortgage. If the title is not good the stipulation is that the surety company, as an abstract proposition, will make good the loss on the collateral arising from defect of title. It is immaterial to the surety company who the borrower is. If the borrower happens to pay there is, of course, no loss to the bank, but that does not alter the nature of the agreement which, in my opinion, is a contract of insurance against loss through defect of title. In the case of the automobile, the substance is that should the collateral be destroyed the borrower will nevertheless pay. The agreement with the land bank is, that should the collateral be destroyed it will be made good again.

It is further suggested that the functions of a title company are, broadly speaking, as follows:

1. To examine titles to real property and to insure the owners of real property and others interested therein against loss by reason of any defect in the titles so examined; and
2. To invest in, purchase and sell bonds and mortgages, with guarantee of payment or guarantee only against loss by reason of defective title to the mortgaged property.

"The surety companies," it is said, "have no desire to interfere in any way with these very proper and appropriate functions of title guaranty companies nor to exercise those functions themselves. The surety companies have no desire to go into the business of examining and guaranteeing titles to real property, nor to invest any of their money in mortgage loans and offer those mortgages for sale as guaranteed mortgages. But the surety companies insist that, under their express power to guarantee the performance of contracts, they have the right to guarantee the payment of loans, whether those loans be secured by mortgage or not, so long as they do not examine titles and do not invest their money in mortgage loans and offer such mortgages for sale accompanied by their guarantee."

The argument of the surety companies then continues: "We think that these ordinary, normal and natural functions of a title guaranty company, involving the examination of titles, and the investment of money in mortgage loans and selling those mortgages with their guarantee, may be considered the exclusive functions of title guaranty companies. It may be that title guaranty companies also have the right to guarantee loans secured by mortgage, where the title is not examined by them or in their behalf and where they have not previously invested their own funds in the mortgage; but if they have this right, this is also the normal and natural function of a surety company and we insist that it is a right which surety companies also have and can exercise and that the *exclusive* privilege of title guaranty companies stops with the guarantee of loans based on their own examination of the title or an examination made in their behalf and where their own funds are invested in the mortgage to be guaranteed."

The argument would be availing were the title companies *required by law to first examine the titles* under the mortgages which they guarantee or the premises which they insure. There is, however, nothing in the law requiring them to examine titles before insuring the same or guaranteeing mortgages thereon. The Legislature in conferring upon title companies the power to guarantee the payment of mortgages must have assumed that they would examine the title, and the theory of the legislation must have been to confer the power to take a title risk which includes the guaranteeing of mortgages upon companies who would make a business of examining titles, not upon surety companies which cannot under the law conduct the business of examining, certifying or insuring titles.

There can be no doubt that the only risk that the surety companies are taking in their agreement with the land bank is that of title. The risks are recited in the schedule policy as follows and are all title hazards:

The surety company agrees to protect the bank against:

(a) Any defect of any kind in the title of the mortgagor to the mortgaged property;

(b) Any conveyance or lease of coal, oil gas, mineral or other surface or subsurface right, right of way, or other right or privilege, affecting the mortgaged property;

(c) Any defect in said title, whether shown or disclosed by the official records or not, as well as errors or omission in said official records;

(d) Any error, omission or misstatement of fact in the original abstract of title, or any information subsequently furnished or supplied by an approved abstractor, which subsequent information shall be deemed a part of said abstract of title, when attached thereto;

(e) Any mistake, misjudgment or misconstruction of law, as well as any mistake or error of any kind on the part of any member of the legal department of said bank.

I cannot but conclude that the agreement with the land bank is the guaranteeing or insuring of a title and not the guarantee of the payment of a loan.

In what I have so far said I have assumed a right in the surety company to guarantee the payment of a loan in whole or in part if the risk assumed was not that of defect of title. In other words, I have assumed that the surety company could guarantee the repayment of the loan irrespective of the fact that the loan was secured by a mortgage, provided only that the guarantee did not attempt to guard specifically against a defect of title. However, there is a strong indication that the guarantee of the payment of any note or bond secured by a mortgage is business confined exclusively to a title guaranty company. Section 170 in this connection reads: A title guaranty company may be formed to "guarantee or insure the payment of bonds and mortgages or notes of individuals or partnerships secured by mortgages upon real property situated in this or any other state," and to "guarantee and insure the owners of real property and chattels real and others interested therein against the loss by reason of defective titles thereto and other incumbrances thereon." Under these powers a title company may guarantee absolutely the payment of a bond secured by a mortgage on real

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property or may guarantee the mortgagee against loss by reason of defective title only. That is, a title company is vested with power essentially that of a surety in so far as the title company guarantees absolutely the repayment of a loan secured by a bond and mortgage and exercises a power functionally that of a title company in guaranteeing the mortgagee against loss by reason of defect of title. The whole field, therefore, including what might naturally be considered the business of a surety company to guarantee absolutely the repayment of the loan and also the business naturally that of a title company to guarantee the mortgagee against loss from defect of title, has been turned over by statute to the title companies.

I am of the opinion that the surety company may not undertake the proposed business. Where the hazard is that of title the Legislature has conferred the insurance company business upon title companies to the exclusion of all other insurance companies.

COMPTROLLER

In the Matter of the GENERAL SCOPE OF THE OFFICIAL DUTIES OF THE STATE COMPTROLLER

(Dated February 1, 1918)

Public finances—outline of, as shown by the details of work in the State Comptroller's office.

Authority of State Comptroller and duties devolving upon him—the horticultural and agricultural interests of the State—the several bureaus of audit, finance, land, municipal accounts and prison.

TRAVIS, Comptroller.—Agriculture is our fundamental industry. No other productive activity is so vital to the public welfare. In fact none exists upon which the life and prosperity of the entire world more peculiarly depends at the present time.

But in no State are horticultural conditions more favorable or more firmly established than here in New York. Nearly one-fifth of the population is rural. Approximately 2,000,000 people are living upon our 216,000 farms.

The relative importance of New York as an agricultural center, however, is frequently overlooked. This is due largely to the tremendous size of our manufacturing interests, and the importance of our metropolitan center.

Notwithstanding the fact that the Empire State leads in wealth and population, it also excels in the output of many products of the soil and it is perhaps providential that in these times of the world's greatest need New York should yield its greatest crop.

A successful and money making farm is of first importance to the State. It means prosperity both to the farmer and to the Commonwealth. During war times especially, every assistance must be given to enable the farmer to meet with success the unfavorable conditions due to the increased cost of material and lack of competent help.

AUDIT BUREAU

The extent of the farming operations carried on directly by the State is perhaps not generally realized. Farms are operated by nearly all of the State hospitals, charitable and penal institutions. In round numbers the total area of land connected with these institutions is about 25,000 acres, about half of which is available for cultivation. The value of these lands is probably upwards of three million dollars, on which the interest alone is a large annual loss to the State unless the land produces a profit from its operation. The farms vary in size from a few acres for garden purposes to more than two thousand acres.

Primarily the object sought in the acquisition of the lands was the healthful benefits to the inmates of the institutions. The question of the profit or loss from their operation was of secondary importance.

The population of the institutions is steadily increasing and in greater ratio is the increasing cost of its maintenance. While the farms have been producing a large part of the food supplies, it has been necessary to purchase a large quantity outside. Whether the farms are profitable or not or producing up to their economical capacity has never been and cannot be determined from the existing records of their operation. In realization of this, the Legislature took up the subject at its last session and delegated to Comptroller Travis the task of formulating a uniform system of accounting for the farms of the State.

Comptroller Travis selected for this work two accountants from his force who had actual farming experience. A system was devised and will be installed in connection with nearly all the institutional farms as of the 1st of January, 1918. A concise description of the plan is worthy of careful thought by every farmer.

DESCRIPTION OF THE SYSTEM

The accounts are to be kept in complete double-entry form the same as in other productive industries and are classified into three main divisions, namely: A. Balance sheet accounts; B. Operating accounts — departmental; C. Operating accounts — general.

The first step is the taking of a complete inventory of all the farm property.

A. Balance Sheet Accounts

These are divided into the following classes: **Assets**; capital accounts; current accounts. **Assets (Debits)**. In the inventory the farm property is classified according to its character, such as — Land; buildings and structures (including fences); horses (teams); wagons, sleighs and harness; equipment (machinery and tools); live stock, etc. Accounts are opened in the ledger for each of these divisions and charged with their inventory values. **Capital accounts (Credits)**. The total value of the inventory is credited in the ledger to farm capital account. For State purposes, further accounts are provided for State appropriations, for farm capital, accrued interest on farm investment, and capital surplus which develop later.

Current accounts (Credits). This group carries current accounts which develop as the operation progresses, such as — State appropriations for maintenance and operation; accrual of employees' maintenance; and (at the end of the year) current surplus (or deficit).

B. Operating Accounts — Departmental

The operating accounts are laid out in a separate division of the ledger somewhat in conformity with the divisions of the assets in so far as the asset groups are to be operated as units, such as — Dairy; poultry; sheep; swine; farm teams; garden; field crops, etc., according to individual circumstances.

C. Operating Accounts — General

This group is intended to carry accounts of items of a general nature which cannot be distributed to the departmental operating accounts currently as they occur, such as depreciation, fertilizers, etc.

The Accounting Forms

The books and blanks of the system are briefly described as follows: 1. Annual inventory of farm property (loose sheet).

2. Farm ledger (loose leaf). 3. Monthly time record of workmen or teams (loose sheet). 4. Monthly labor summary and distribution (loose sheet). 5. Farm expenditures book — bound, 300 pages. 6. Monthly report of farm production (loose leaf). 7. Farm production book — bound, 300 pages. 10. Report of products issued from farm stores (loose sheet). 12. Monthly record of live stock (loose sheet).

The Accounting Scheme

The farm ledger is divided into four sections, namely: Assets; capital accounts; current accounts; operating accounts. Classes of accounts which comprise the first three divisions have been previously described under their titles. In the operating section, accounts will be opened with the various departments such as:—Field crops; garden; dairy; swine; poultry; farm teams, etc.

Each department is charged (debited) with its labor and other expenses and credited with its income or what it produces. The labor is reported on the monthly time record of workmen (Form 3) used also as the time record of teams — a separate sheet for each workman and each team. When these sheets are completed at the end of the month, the value or cost of the labor is entered in the farm expenditures book, either directly or through the summary sheet (Form 4) in case of numerous workmen. Any expenses such as repairs, purchase of supplies, etc., for the various departments are entered directly into the farm expenditures book and charged to the proper departments.

The production is recorded and reported on the monthly record of farm production (Form 6) and credited to the department which produces it, a separate sheet being used for each product.

To complete the double-entry, expenses as charged are credited to the source which pays them — in case of the State, to State appropriations for maintenance and operation account. In private practice, the expenses would be credited to cash or to the individual who supplied the money. Production, as credited, is charged, in case of the State, either to the institution if delivered directly to it, or to farm stores account if stored on the farm. As

withdrawn from stores for feeding, sale or otherwise, the farm stores account is credited; if sold for cash, cash is debited, if for feeding the department such as teams, dairy, etc., to which it is fed is debited; if sold on time, accounts receivable is debited.

Some items, such as depreciation, fertilizers, general repairs, etc., cannot well be distributed as they occur. It is better to carry these in separate accounts in the general operating section until the end of the year and distribute them as closely as possible by careful estimate. Interest on the full amount of the farm investment as it stood at the beginning of the year should also be split up and charged to the operating departments as nearly as possible according to the capital investment of each, the total amount being credited to interest as income. At the end of the year — the calendar year being adopted as covering most nearly the season's operations — the books are to be closed. A profit and loss account will have been opened for each department, to which the balance of each separate account of the department is to be carried. The balance of the profit and loss account of each department is to be carried to current surplus account for the year, which will then show the net results of the year's operations. In case of expense of crops which do not mature within the year, such as fall wheat for instance, so much of its cost to the close of the year may be left standing in the account and brought down as a deferred asset and expense of the next year's operations.

(Specimen Account Page)

Taking for example two departments of different characters of operation such as dairy and field crops, the principal items which would enter into the accounts of their operation would be about as follows:

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<i>Debit</i>	DAIRY — OPERATION		<i>Credit</i>
	EXPENSE	INCOME	
Labor	\$	Milk	\$
Teaming		Cream	
Feed purchased		Butter	
Bedding purchased		Cheese	
Home products used		Beef	
Veterinary services and medicines		Veal	
Cattle slaughtered for beef		Tallow	
Maintenance of equipment		Calves born	
Maintenance of buildings and structures			
Interest on investment			
Balance (if gain)		Balance (if loss)	

<i>Debit</i>	FIELD CROPS — OPERATION		<i>Credit</i>
	EXPENSE	INCOME	
Labor	\$	Alfalfa	\$
Teaming		Barley	
Seed purchased		Buckwheat	
Seed, home product		Corn	
Fertilizers purchased		Corn fodder	
Manure, home product		Corn silage	
Supplies purchased		Hay	
Maintenance of equipment		Oats	
Interest on investment		Pumpkins	
		Rye	
		Wheat	
		Straw	
Balance (if gain)		Balance (if loss)	

FINANCE BUREAU

The recent organized efforts on the part of New York State to stimulate the production of agricultural products during the war draws attention to the aid offered by the State to encourage intensive agriculture here. According to the records in State Comptroller Travis' office, State appropriations for agricultural work began soon after the formation of government although they did not reach any extensive sum before the establishment of the State Agriculture Department in 1884.

As early as 1806, however, money was set aside for the purpose of encouraging agricultural exhibitions where prizes were awarded. The first State Agricultural Board was created in 1819 and during the seven years of its existence many thousands of dollars were appropriated for prizes and for the current expenses of the Board.

In 1841, when the New York State Society of Agriculture was organized, an annual appropriation of \$8,000 was made, and in that year the first fair at Syracuse was held, where, it is said, over 15,000 spectators were present. During war times this fair was discontinued, but in the latter 60's and 70's it was revived, and the Legislature continued to make appropriations to Agricultural Societies with additional money set aside for special work such as the study of some crop destructive agencies.

The first appropriation for an agricultural experimental station was made in 1881, and the State Dairy Commission was created in 1884, the same year that the State Department of Agriculture was started. State aid was given to Cornell College of Agriculture in 1895, and to the State Veterinary College in 1896.

The State Fair Commission was organized in 1900 and since that time appropriations have been made for the purpose of carrying on instructions in agriculture in St. Lawrence and Alfred Universities and other agricultural schools throughout the State. During the last fifteen years, the State's appropriation for agricultural purposes has increased over 200 per cent, this year's amount totaling \$3,500,000.

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LAND BUREAU

Approximately 15,000 acres of arable land included in the 216 farms acquired by the State through foreclosure have been thrown open to encourage the cultivation of fertile acreage, according to a statement issued recently by State Comptroller Travis, under whose supervision this property has been placed. These farms represent a small part of the United States Deposit Fund originally invested in mortgages on lands which the State was obliged to take over upon default of payment.

Discussing the project, Comptroller Travis declared that the State must make every effort to encourage the cultivation of the largest possible extent of tillable lands. "Victory in this war rests to a large degree with the farmers," said he, "and upon them depends the fate of the nations at war. We must produce an abundance of food not only for ourselves and our armies, but also for the greater number of our allies who, after peace is declared, will rely upon the harvest of America."

"New York is the greatest agricultural state in the nation and must not overlook any phase of its industries that will increase the production or bring about the most effective cooperation in its sale and distribution. It is of the greatest importance that at this time everything possible be done at once to make sure of a plentiful harvest."

MUNICIPAL ACCOUNTS BUREAU

To assist officials in the transaction of town business and to inform them of their powers and duties, with particular reference to public money, State Comptroller Travis announced recently a plan which, it is believed, will produce most beneficial results in the management of public business. In making public this plan, Mr. Travis said:

"I am firmly convinced that municipal officials generally are desirous of conducting the affairs of their respective offices in conformity with law and good business practices. The laws governing municipalities are complex. To a layman they seem unnecessarily so. Particularly is this true of the Town Law, which in many respects I consider obsolete. In the larger municipalities,

legal advisers are available to interpret the law for the officials, but in the towns of the State men are taken from the ordinary walks of life and injected into public office without practicable means of acquiring information of what they should do or how they should do it.

"Realizing this condition, I have prepared a handbook for town officials, in which are set down in concise form those common, ordinary powers and duties of town officials respecting finances, of which they should be informed when assuming office. It is devoid of complex legal quotations and stripped of legal phraseology. I believe any man elected to a town office, who has no knowledge of the office, can with this handbook before him, in a space of thirty minutes, thoroughly acquaint himself with the responsibilities of his position—with the common, ordinary duties required of him. This handbook is not yet in printed form ready for distribution, but will be perfected, published and distributed to more than six thousand town officers, in the near future."

PRISON BUREAU

The State's treatment of the criminal classes is fundamentally that of punishment and the protection of society. In New York, however, the main object is not only restraint and segregation, but prevention and reformation. To accomplish this considerable expense has been necessary, and how the public funds have been appropriated for this service may be of interest to relate.

The financial management of our penal institutions was not placed under the direct supervision of the State until comparatively recent times. Years ago, however, the agents were required to report to the State Comptroller as to prison receipts and disbursements. According to Comptroller Travis' records, the first State prison erected in New York City cost \$250,000, and at present there are five prisons, a farm for women and two hospitals for the criminal insane, all representing an investment of about \$7,500,000.

During the last thirty years, large appropriations have been advanced for installing manufacturing plant purposes, and to date

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the total resources amount to approximately \$2,000,000. Receipts collected from the sale of manufactured articles useful to other State institutions and municipalities constitute the Prison Capital Fund. Whenever any excess exists over what is necessary to meet the prison expenses, the State Comptroller pays this amount over to the State treasury. Since 1910, \$325,000 has been so transferred, while the net earnings of all prisons during that period amounted to \$1,117,141.03. Legislative appropriations for expenditures incident to additional construction amounted to \$165,696.33. During the years 1914 and 1915, maintenance expenditures out of the capital fund totaled \$280,000.

The following statement shows in summarized form the transactions for general purposes of State government (*i. e.*, the General Fund and Canal Maintenance and Repair Fund combined) for the seven months ended January 31, 1918, in contrast with the same period of the preceding year:

GENERAL PURPOSES OF GOVERNMENT	Seven months ended	
	Jan. 31, 1918	Jan. 31, 1917
Revenue receipts:		
General fund:		
Direct taxes	\$40,449 07	\$1,003,619 32
Indirect taxes	37,903,257 80	36,788,548 03
Other revenues and receipts.....	2,700,442 35	1,796,643 49
Canal fund:		
Maintenance, repairs, etc.....	1,970 75	16,351 47
Total revenue receipts	<u>\$40,646,119 97</u>	<u>\$39,605,162 31</u>
Expenditures:		
General fund:		
Ordinary expenditures, etc.....	\$25,790,832 46	\$19,719,275 72
Debt service contributions, etc.....	13,057,279 16	8,330,919 72
Canal fund:		
Maintenance, repairs, etc.....	1,105,669 27	1,163,295 99
Total expenditures, etc.....	<u>\$39,953,780 89</u>	<u>\$29,213,491 43</u>
Excess revenue receipts over expenditures, etc.	<u>\$692,339 08</u>	<u>\$10,391,670 88</u>

INSURANCE DEPARTMENT

In the Matter of the Application of THE NEW YORK LIFE INSURANCE COMPANY for Leave to Insert in Its Insurance Policies a Restrictive Clause against Aviation

(Ruling made August 8, 1917)

A proposed clause to be inserted in insurance policies restricting the insured from engaging in aviation or aeronautic ascensions is in violation of the Insurance Law.

The New York Life Insurance Company has drawn up and submitted to the Department for approval a new clause for insertion in its future policies. This clause restricts the insured from engaging in aviation or aeronautic ascensions, and provides that if the insured shall die as a result, either directly or indirectly, of so engaging, the liability of the company shall be limited to the reserve held by it on the policy less any indebtedness on said policy to the company. In Massachusetts the Insurance Commissioner has sustained this clause but in Ohio the clause has been disapproved by the Commissioner. *Held*, that in this State, apart from the provision relating to military or naval service, the Legislature evidently intended that after policies had been in force two years, if the premiums were duly kept up, the policy holder would be absolutely assured that in the event of his death from any cause whatsoever the amount of the policy would be paid without contest. *Held*, also, that a clause restricting liability where death occurs by reason of aviation cannot be permitted as the statute now permits one exception relating to the occupation of the assured, to wit: military or naval service in time of war. The clause submitted by the New York Life Insurance Company is in violation of subdivision 2 of section 101 of the Insurance Law and cannot be approved.

PHILLIPS, Superintendent.—Pursuant to section 101 of the Insurance Law, the New York Life Insurance Company has submitted to me for approval the following clause to be inserted in its policies hereafter issued:

“This policy does not insure against death resulting from engaging in aviation or aeronautic ascensions. If the insured shall die as a result either directly or indirectly of so engaging, the liability of the Company shall be limited to the reserve held

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by the Company on this policy, less any indebtedness hereon to the Company."

The request for approval of the clause above mentioned presents a question whether the same is in violation of subdivision 2 of section 101, commonly known as the "incontestability" provision. So far as I have been able to ascertain, this precise question has never been presented to the court for determination, and we are compelled to give consideration to the question without the guidance of a court decision.

The States of Massachusetts and Ohio have laws similar to the law in this State regarding standard provisions to be inserted in life insurance policies. The Commissioner of Massachusetts has approved the precise form now under consideration, and holds that the same is not in conflict with the incontestability provision.

The Superintendent of Insurance of the State of Ohio has taken an opposite position, disapproved the clause, holding that the same is in violation of the incontestability provision of the statute, and, in a memorandum filed with such disapproval, states as follows:

"The Standard Provision Law of Ohio provides that life insurance policies issued in this State shall be incontestable after two years, except for two things and two things only, viz: non-payment of premiums and violation of the provisions relating to military and naval service in time of war. Red Cross service, aeronautics, submarine service and work in munition factories are not necessarily included in military and naval service. References to such service should be limited to the first two years of the policy during which time the policy is contestable. After two years this company is not permitted to pay less than the face of the policy in case of death from Red Cross service or aeronautics or submarine service, or work in munition factories, provided of course that all premiums required by the company have been paid by the insured up to the time of death."

In view of the conflicting opinions rendered by the distinguished Commissioners of Massachusetts and Ohio, the situation requires us to examine as thoroughly as possible the circumstances and reasons governing the use of the incontestability clause. I am

not advised as to the practice which prevailed prior to the so-called Armstrong legislation of 1906. Presumably there were as many different methods pursued upon this subject as there were companies engaged in the business. By chapter 326 of the Laws of 1906, section 101 of the Insurance Law was enacted, requiring standard forms of life insurance policies. Four standard forms of policies were prescribed therein, each of which contained the following relating to incontestability:

"Incontestability. (The policy shall here provide that it shall be incontestable, except for non-payment of premiums, either from its date or after one or two years, in the following form.) This policy shall be incontestable, except for non-payment of premiums, * * * from this date."

It seems to me to be very clear that when the Legislature enacted this statute it intended that, after the limited period fixed by the policy, every policyholder was to have the right to collect the whole amount provided on the face of the policy, except in case of non-payment of premiums.

Each of such standard policy forms also contained the following, immediately preceding the incontestability clause:

"Conditions. (The policy may here provide for restrictions of liability by reason of travel, occupation, change of residence and suicide, applicable only to one year after the issuance of the policy.)"

Clearly under this provision, had it been sought to make restrictions relating to aviation, such restrictions as to the recovery of the amount provided upon the face of the policy would be limited to one year after the issuance of the policy. In other words, under the standard policy law of 1906 the provision now proposed by the New York Life Insurance Company could not possibly have been used.

In his annual report to the Legislature in 1909, Superintendent Kelsey recommended the repeal of the standard policy law and the enactment of a law regulating the issuance of forms of life insurance policies. The Legislature thereupon, by chapter 301 of the Laws of 1909, adopted the so-called standard provisions

law, making certain standard requirements as to provisions to be contained in all life insurance policies, among which subdivision 2 was in the form in which it is found to-day in the statute, as follows:

"2. A provision that the policy shall be incontestable after two years from its date of issue except for non-payment of premiums and except for violation of the conditions of the policy relating to military or naval service in time of war."

This provision seems to be a consolidation of the two provisions above quoted from the standard policy law of 1906 relating to "incontestability" and to "conditions," the provisions of the old law relative to "conditions" being omitted and the provision relating to military or naval service being added.

It is rather difficult to speculate just what created the demand for the enactment of a law compelling life companies to insert in their policies a provision that after a certain period of time the policy could not be contested except for the non-payment of premiums. I apprehend, however, that before the enactment of such a law, the practice had become general among all companies to contest liability under their policies on account of some misrepresentation made by the insured in the application. Necessarily, this contest would not occur until after the death of the insured, which, in many cases, is several years after the issuance of the policy. This rendered it extremely difficult for the beneficiary to furnish proof in refutation of the claims made by the company, and led to abuses generally detrimental to the interest of the beneficiary. No doubt it was this evil which led to the enactment of the incontestability clause. It would seem to me that it was perfectly proper to compel the companies to insert in their policies a clause whereby the company was prevented from contesting the policy within a certain period of time for any fraud or misrepresentation which entered into the making of the contract, but I can see no good reason why the company should not be permitted under their power to write life insurance to insure such risks as they desired. This may have been the original intention of the Legislature, but, after a careful consideration of

the old statute and of the present statute, the clear language of the statute expresses the intention that, with the exception of the provisions relating to military or naval service, the full amount of the policy provided on the face thereof should be payable absolutely, upon the death of the insured, if the premiums had been duly paid. Apart from the provision relating to military or naval service, the Legislature, from the language employed in the statute, evidently intended that after a policy had been in force two years, if the policyholder kept up the payment of his premiums, he would be absolutely assured that, in the event of his death from any cause whatsoever, the full amount agreed to be paid would be paid, and that no contest could be made against his beneficiaries under the policy.

As further sustaining the idea that a clause restricting liability to pay the full amount provided on the face of the policy, where death occurs by reason of aviation, cannot be permitted, due consideration should be given to the fact that the statute now permits one exception relating to the occupation of the assured, to wit, military or naval service in time of war.

I have therefore reached the conclusion that the clause submitted by the New York Life Insurance Company is in violation of subdivision 2 of section 101 of the Insurance Law, and cannot receive my approval.

In the Matter of the MUTUALIZATION PLAN of the Equitable Life Assurance Society of the United States

(Ruling made February 6, 1918)

Outline of the principles upon which a proposed plan for the mutualization of an insurance company is properly approved.

Fair treatment of minority stockholders assured.

The Equitable Life Assurance Society of the United States, pursuant to section 95 of the Insurance Law, submitted for the approval of the Insurance Department a plan of mutualization for the acquisition of its capital stock, consisting of 1,000 shares of the par value of \$100,000. The plan proposed has been adopted by the directors, approved by the

stockholders representing a majority of the capital stock, and by a majority vote of the qualified policyholders, such policyholders voting at a meeting held pursuant to statute. Outline of the substance of the plan as proposed for the mutualization of the said society given. The question for determination by the Insurance Department is whether the proposed plan is in the interest of the insuring public in general, and, if consummated, will it violate the rights of existing policyholders or affect the security of their obligations.

Held, that the plan now presented, if approved, will lead to the retirement of the capital stock and the complete mutualization of the society will be ultimately realized. The owner of the majority of the shares of the capital stock has agreed to sell at the price stipulated in the plan, so that in the event of the failure of the remaining stockholders to sell their stock the election and control of the board of directors of the society will nevertheless be vested in the policyholders. The Equitable Life Assurance Society is the only large domestic life insurance company that has not succeeded in retiring its capital stock. Until the amendments to the law passed at the last session of the Legislature it had not been able to present a feasible mutualization plan. The great value of the majority stock in this society lies in its control of nearly \$800,000,000 of trust funds. The removal of this power of control, which may be exercised by a single individual, is in itself a sufficient justification for the payment of a higher price for the dominating stock interest than for the holdings of the minority, even if such payment were to be made directly from the present surplus of the society. The minority holders under the plan are given fair and liberal treatment, having the right to offer, within a limited period, their stock for sale at a price much in excess of its actual investment value. The policyholders, by acquiring the majority stock, can control, through the trustees, the society's management, but it is desirable that the entire capital stock be ultimately acquired. Public confidence is more or less disturbed by each transfer of stock, as such a sale does immeasurable harm to the business of the society and hence indirectly affects the security of its policyholders. By means of the plan now proposed the society will be enabled to enter upon a new era of progress, with its position materially strengthened, and its further activities and accomplishments inuring not only to the benefit of present but future policyholders. The plan is hereby approved.

PHILLIPS, Superintendent.—Pursuant to section 95 of the Insurance Law, the Equitable Life Assurance Society of the United States has submitted for approval a comprehensive mutualization plan for the acquisition of its capital stock, consisting of 1,000 shares of the par value of \$100,000. The plan has been duly adopted by the directors, approved by the stockholders representing a majority of the capital stock and by a

majority vote of the qualified policyholders voting at a meeting held pursuant to statute. The total number of votes cast and counted at such meeting was 87,528, of which 84,364 votes were in favor of, and 3,162 votes against, said plan.

The plan, in substance, provides for the purchase from T. Coleman duPont of 564 shares of the capital stock of said society at \$5,400 per share for 501 shares, and \$1,500 per share for 63 shares, amounting in the aggregate to \$2,799,900, the purchase price to be paid in semi-annual installments between November 1, 1917, and May 1, 1937, from interest hereafter received by the society upon its mortgage of \$20,500,000 now held against the Equitable Office Building Corporation upon premises known as the Equitable building, No. 120 Broadway, in the city of New York, the right to receive said installments to be subordinate to the right of the society to receive in full the principal on said mortgage and its share of the interest thereon. The society also releases its right to receive, under an agreement heretofore executed between said Equitable Office Building Corporation and the society, the 9 per cent of all future dividends paid by said Equitable Office Building Corporation out of the surplus earnings upon its outstanding common stock. As the sole property of the building corporation consists of the Equitable building and lot, which is first subject to mortgages aggregating \$25,000,000 and an issue of \$260,000 of 6 per cent cumulative preferred stock, the right to share in a prospective dividend on the common stock is of little present value. The society agrees to execute and deliver to the said Equitable Office Building Corporation an agreement extending the time of payment of the \$1,000,000 of principal of the mortgage above mentioned, which under the terms thereof, is payable in installments from November 1, 1919, to November 1, 1935, inclusive, so that same shall be payable in installments from November 1, 1919, to May 1, 1974, the same as the balance of the principal is now payable under the terms of said mortgage.

The plan further provides for the purchase by the society of the remaining shares of the capital stock, or such portion thereof

as may be offered to it, within ninety days from the date of the approval of the plan by the Superintendent of Insurance, at \$1,500 per share. After the expiration of said period of ninety days, the society may at any time, with the approval of the Superintendent of Insurance, purchase any of the then remaining outstanding shares of stock at a price not exceeding \$1,500 per share. The duPont stock, and all other stock acquired by the society by gift, bequest or purchased in the manner above specified, shall be assigned and transferred to trustees to be held in trust for the policyholders of the society until all the capital stock is acquired. The society, in formulating and submitting the plan, has, in all respects, complied with the statutory requirements, and the approval of the Superintendent of Insurance is now requested to make same effective.

There has been no serious objection from any reliable interested person urged against the adoption of the plan, except upon the part of certain minority stockholders who sought by legal proceedings in the United States court to restrain the society from carrying out and submitting the proposed plan. They alleged that the stockholders, and not the policyholders, were entitled to the "free surplus" of the society, and therefore it had not the legal right to pay one stockholder a greater price for his stock than for the stock of the other shareholders, it being their chief contention that all stockholders must be treated upon an equal basis, and the same price should be paid for all the stock. The United States Circuit Court of Appeals, however, held in substance that all the surplus of the company belonged to the policyholders; that there was no obligation upon the stockholders to sell their stock at the price fixed in the plan, and their rights were in no way violated. It having been decided that the stockholders, in the event of a final dissolution of the corporation, had no interest in the surplus, and therefore could not legally complain as to the manner of its disposition, the only question to be now determined is whether the mutualization of the Equitable Life Assurance Society, in accordance with the proposed plan, is in the interest of the insuring

public generally; and, if consummated, will it violate the rights of existing policyholders, or affect the security of their obligations.

The Armstrong Investigating Committee, in its report to the Legislature of 1906, pointed out the evils arising from the stock control of a large life insurance company, whereby a single individual by the acquisition of a majority of the shares of capital stock was enabled to control and manipulate the vast amount of assets owned by such a company. Since that date, public sentiment has been largely in favor of the mutualization of all large life insurance companies.

The Equitable Life Assurance Society is the only large domestic life insurance company that has not succeeded in retiring its capital stock. Although frequent attempts have been made to accomplish that purpose, not until the amendments to the law passed at the last session of the Legislature has it been able to present a feasible mutualization plan. In my report to the Legislature last year, in recommending the legislation which was subsequently enacted, I stated: "The desirability of the retirement of the capital stock of a stock life insurance corporation, and wresting the control of such company from an individual, or a clique of individuals, who hold a majority of the stock and placing such control with the policyholders, is in the interest of the insuring public, and for the benefit of the policyholders of the company whose stock is thus acquired."

In the plan which is now presented, if approved, the retirement of the capital stock and the complete mutualization of the society will ultimately be realized. The owner of the majority of the shares of capital stock has agreed to sell at the price stipulated in the plan, so that in the event of the failure of the remaining stockholders to sell their capital stock, the election and control of the board of directors of the society will, nevertheless, be vested in the policyholders.

The only criticism which can be justly urged against the plan is the seemingly large price paid for a majority of the shares of capital stock, the par value of which is \$50,100. I appreciate the difficulties of accurately measuring its controlling value, which has been variously reflected by past sales. In 1905, 502 shares of stock

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were sold by the then owner to Thomas F. Ryan for \$2,500,000, the latter subsequently selling 510 shares for \$3,000,000, while the 564 shares now held by Mr. duPont were purchased in 1915 for \$4,394,540. These sales indicate that great financiers have recognized the enormous value in the majority stock solely because of its power to control nearly \$600,000,000 of trust funds, and the effect of such control upon other financial institutions.

The removal of this power of control, which at present may be exercised by a single individual, is to my mind a sufficient justification for the payment of a higher price for the dominating stock interest than for the holdings of the minority, even if such payment were to be made directly from the present surplus of the society.

The price provided in the plan for the purchase of the majority stock is \$1,500,000 less than the present owner paid in 1915, and considerably less than it sold for in 1910. Furthermore, it can be acquired without a material depletion of the present surplus, so that the security to the existing policy obligations will not be impaired. The purchase price is to be paid out of the future interest earnings from the Equitable Building Corporation mortgage, extending over a period of twenty years, and such payment is subject to the prior right of the society to receive in full the principal upon said mortgage becoming due during said period and its share of interest. The society is not otherwise obligated to pay. The practical result of this method of payment is a reduction from 4.72 per cent to 3.90 per cent in the effective rate of interest which the company will realize upon this particular security during the period of its existence.

While it is true that Mr. duPont will receive the amount of the purchase price of his stock with interest at the rate of 5 per cent per annum during the period above mentioned, he will only receive it in case the mortgage remains good and the society receives during that period \$2,500,000 upon the principal of said mortgage and its share of the interest, at the same time the entire investment yielding net 3.90 per cent.

The history of the existing mortgage upon the Equitable Building is well known to the public. Early in 1912 the home office building of the society was completely destroyed by fire, leaving the ownership of the site on which the present building is located in the society, and carried upon its books at a valuation of approximately \$13,500,000, the assessed valuation being \$12,000,000. The society received no revenue from this land and losses thereon through payment of large amounts in taxes were rapidly accumulating. There was no way by which the property could ever have been made income producing except by the erection of a modern office building. The society was not in a position to assume such a gigantic undertaking. A serious problem was thereby presented, and after considering various proposals the society in August, 1912, entered into an agreement with the Equitable Office Building Corporation, which was subsequently modified, whereby the Building Corporation agreed to purchase of the society the site at \$13,500,000 and erect thereon a building to cost approximately an amount equal to the valuation of the site, conditioned that the society loan to the Building Corporation \$7,000,000, which, together with the amount of the purchase price, was to be secured by a first mortgage upon the premises and the building when completed. The actual aggregate cost of the building exceeded \$14,500,000. Thus the present Equitable mortgage came into existence. If the plan now proposed is carried out, the society will be enabled to retire 564 of the 1,000 shares of capital stock and will realize interest at 3.90 per cent per annum upon its mortgage investment, the greater part of which is the value of the site, which, after the fire in 1912, was absolutely nonproductive.

It is doubtful if any future proposition for the acquisition of the majority of the capital stock will contain so many favorable advantages to the society and its policyholders as the present plan.

Believing as I do, for reasons above stated, that the majority stock is more valuable than the minority shares, I am of the opinion that the minority stockholders are receiving absolutely fair and liberal treatment under the plan. They have the right to offer, within a period of ninety days, their stock for sale at a price

considerably in excess of its actual investment value. In recognition of the principle that the State, except under the right of eminent domain, cannot compel a person to part with his property at a compensation which he is unwilling to accept, the plan affords each stockholder the opportunity to dispose of his stock, if he so desires, at a more than reasonable price. Although, by acquisition of the majority stock, the policyholders through the intervention of the trustees can control the society's management, still it is desirable that the entire stock be ultimately acquired. It must be conceded that unless the controlling interest of the capital stock is retired or its voting power permanently vested in trust for the benefit of the policyholders it will always be subject to speculation and sale. Public confidence is more or less disturbed by each transfer, for fear the purchaser is acquiring control for self-aggrandizement or some ulterior purpose not for the public good. Such a sale does immeasurable harm to the business of the society, and thereby indirectly affects the security of its policyholders.

The movement for mutualization of the Equitable began in 1909. Efforts to accomplish that result have been made from time to time without success. There is now presented a plan for mutualization of the society upon a most favorable basis, which, if approved and carried out, will result in no material depreciation of the surplus and will secure to its policyholders for all time the absolute right to choose the directors, and thus maintain control. The society thereby will be enabled to enter upon a new era of progress, with its position materially strengthened and its further activities and accomplishments inuring not only to the benefit of present but future policyholders. The plan is hereby approved.

STATE INDUSTRIAL COMMISSION

In the Matter of the Claim of HUBERT HENRY OBERLE, for Compensation Under the Workmen's Compensation Law, against ATLANTIC TRANSPORT LINE, Employer and Self-Insurer

File No. 36985

(Decided January 14, 1918)

Injuries sustained by Hubert Henry Oberle while employed as a tallyman by the Atlantic Transport Line in New York city.

The claimant, while employed by the Atlantic Transport Line as a tallyman at Pier 58, North river, in the city of New York, and while delivering a load to the public store, on March 28, 1916, was hit on the left knee by the truck which he was handling, injuring his left leg, affecting the knee-joint and shortening the leg. His injuries disabled him until November 21, 1917, and on that date he was still disabled. His average weekly wage was the sum of seventeen dollars and thirty-one cents. The employer, having acquiesced in the award, is held to be estopped from raising any question in respect to the jurisdiction of the Commission herein. An award was made.

On March 28, 1916, Hubert Henry Oberle sustained injuries as hereinafter set forth. On July 22, 1916, he duly filed a claim for compensation with this Commission, which claim contained an assignment to the employer and self-insurer of any and all rights of said claimant against any person, firm or corporation in consequence of the injuries sustained by Hubert Henry Oberle. By letter dated August 14, 1916, the attorneys for the employer objected to the jurisdiction of this Commission on the ground that the claimant herein was at the time of the injury employed as a tallyman, which was not a person engaged in one of the hazardous employments enumerated in section 2 of the Compensation Law. Thereafter, awards of compensation were duly made by this Commission, beginning on September 19, 1916, and covering the period of disability which began on April 19, 1916. The em-

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ployer and self-insurer acquiesced in and paid said awards up to and including September, 1917, being in all \$850. The awards were as follows: September 19, 1916, October 10, 1916, November 28, 1916, December 8, 1916, April 13, 1917, and September 25, 1917. In each instance notice of said award was duly mailed to all parties pursuant to sections 20 and 23 of the Compensation Law. On October 2, 1917, notice of the award of September 25, 1917, was duly mailed to all parties. None of the above mentioned awards were appealed from. On November 20, 1917, an award was duly made for the period of thirty-two weeks beginning on September 26, 1917 and ending on November 21, 1917, and from this award the employer has appealed, although at the hearing held on November 20, 1917, the representative of the employer admitted that the claimant was then still unable to work.

Hearings were held herein on September 19, 1916, October 10, 1916, November 28, 1916, December 8, 1916, April 3, 1917, May 29, 1917, June 12, 1917, June 26, 1917, September 25, 1917, and November 20, 1917. Hearings were also held on December 21, 1917, January 7, 1918, and January 14, 1918, and the testimony taken at the last hearings ordered to be made part of the record herein.

Robert W. Bonynge, counsel to State Industrial Commission.

Kirlin, Woolsey & Hickox, attorneys for employer and self-insurer.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusion of fact, ruling of law, award and decision as follows:

On March 28, 1916, the day when Hubert Henry Oberle received his injuries, he resided at No. 1123 Washington street, Hoboken, N. J., and was employed by Atlantic Transport Line, engaged in moving or handling cargoes or parts of cargoes of grain, coal, ore, freight, general merchandise, lumber or other

products or materials on docks, platforms and places. Hubert Henry Oberle was employed as a checker or tallyman.

On said date Hubert Henry Oberle was working for his employer and while engaged in the regular course of his employment and while on pier 58, North river, New York city, while delivering a load to the public store, he was hit on the side of his left knee with the handle of the truck, and sustained injuries to his left leg which resulted in a marked enlargement as well as marked limited immobility of the knee-joint, and in a marked shortening of the leg, which injuries disabled him from the date of said accident to November 21, 1917, and on that date he was still disabled.

The average weekly wage of Hubert Henry Oberle was the sum of seventeen dollars and thirty-one cents.

It does not appear whether written notice of injury was given to the employer within ten days after disability, but the employer was aware of the accident at the time of the happening thereof and provided medical attention immediately, as appears from the Employer's First Report of Injury. Therefore, the employer and self-insurer was not prejudiced by the failure, if any, to give written notice of injury within ten days after disability.

The assignment to the employer and self-insurer of any and all rights of the claimant against any person, firm or corporation in consequence of the injuries sustained by him, and which said assignment is contained in the employee's claim for compensation filed herein on July 22, 1916, constitutes a valid consideration running to the employer and self-insurer for the acceptance by the claimant of the Commission's awards herein.

At the hearing held on November 20, 1917, the representative of the employer and self-insurer admitted that the claimant herein was still unable to work.

Award of compensation is hereby made against Atlantic Transport Line, employer and self-insurer, to Hubert Henry Oberle, injured employee, at the rate of eleven dollars and fifty-four cents per week for a period of 32 weeks from September 26, 1917, to November 21, 1917, and this claim is hereby continued for further hearing.

The failure, if any, of Hubert Henry Oberle to give written notice of injury to his employer within ten days after disability is hereby excused on the ground that the employer and self-insurer was not prejudiced by such failure, if any.

The employer and self-insurer, after having raised the question of the jurisdiction of this Commission by a letter dated August 14, 1916, thereafter acquiesced in the awards made by this Commission and made payments thereunder for a considerable period and up to September 19, 1917, and having caused the claimant by its course of conduct to rely and depend upon said awards, and the course of conduct on the part of the employer including payments of awards having continued after the United States Supreme Court had passed upon and interpreted the Compensation Law, particularly in respect to its constitutionality as applied to maritime contracts, and the claimant having been lulled into security until some of his rights may have been eliminated, and particularly his opportunity to secure the proper evidence for a suit either at common law or in admiralty has gone, the employer and self-insurer is estopped from raising any question in respect to the jurisdiction of this Commission herein.

In the Matter of the Claim of THEODORE BLOOM, for Compensation under the Workmen's Compensation Law, against BRITISH AMERICAN CHEMICAL COMPANY, Employer; TRAVELERS' INSURANCE COMPANY, Insurance Carrier

Case No. 2981

(Decided January 17, 1918)

Injuries sustained by Theodore Bloom, while employed as a chemist by the British American Chemical Company.

On June 20, 1916, Theodore Bloom, while employed as a chemist in a laboratory and using a glass flask containing an acid, was injured by the bursting of the flask, releasing gases which resulted in his contracting tuberculosis. Claim dismissed because of the failure of the claimant to give the required notice of his injuries. Award denied.

SAYER, Commissioner.— Claimant was working as a chemist in a laboratory and on June 20, 1916, a glass flask, containing trichloride of phosphorous burst, liberating gases that irritated the mucuous membranes of the throat, eyes, etc. He continued at work until near the end of the following November, when he was found to be suffering with tuberculosis. He appears to have first consulted a physician on August first. He filed a claim for compensation on Janary 17, 1917. It is claimed that the fumes inhaled on June 20, 1916, caused the tuberculosis or aggravated a pre-existing tubercular condition, and that the bursting of the flask and subsequent irritation from gas was an accidental injury.

No written notice of an accident was given, but testimony is offered tending to prove that a chemist, the immediate superior of the claimant, was verbally informed of the happening shortly thereafter and that he helped to clear the room of the chemicals.

Before we can allow the claim, we must find it to be reasonably certain that the disability resulted directly from the gases liberated by the accident on June 20, 1916. Upon the evidence, I cannot so find. The most that we can find is that it might have had something to do with it. But we must not speculate about it. Counsel for the claimant in his brief suggests that claimant very likely had such accidents before, and that the effects of them passed away without serious consequences. The same thing may have happened with regard to the effects of the fumes on June twentieth. It may have been the result of long work among chemicals, with the cumulative effect of them on his system, and in this respect have been like an occupational disease. Or again the disease may just as likely have resulted from purely natural causes unrelated to his employment.

And, further, claimant's failure to give notice is a serious bar to his claim. We may under the law excuse his failure if we find the employer had knowledge, and was not thereby prejudiced. I do not find that the employer had knowledge. At most a superior chemist had knowledge. It does not appear that he was an officer or responsible person in the corporation, and when, months later, a claim is presented to the employer, this person

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who is alleged to have had knowledge was no longer in the employ of the corporation but is employed in a distant state. Surely we cannot say, in the light of all the facts and under the rule laid down by the Appellate Division in the case of *Dorb v. Stearns*, that the employer was not prejudiced in his right to a timely investigation of all the circumstances.

The claim must be dismissed.

In the Matter of the Claim of MINNIE LAMBERTSON, Alleged Dependent Mother, and GEORGE W. LAMBERTSON, JR., Infant Son of GEORGE LAMBERTSON, Deceased, for Compensation under the Workmen's Compensation Law for the Death of GEORGE LAMBERTSON, against ORANGE COUNTY TRACTION COMPANY, Employer; TRAVELERS' INSURANCE COMPANY, Insurance Carrier

Death File No. 6376

(Decided January 17, 1918)

Injuries sustained by George Lambertson, resulting in his death, while employed as a conductor by the Orange County Traction Company.

On July 13, 1916, George Lambertson, while employed as a conductor on an electric car by the Orange County Traction Company at the village of Walden, N. Y., was attempting to fix a trolley-pole under a hook on the car roof when he received an electric shock which threw him from the top of the car to the ground, inflicting injuries resulting in his death on August 6, 1916. His average weekly wage was the sum of seventeen dollars. The deceased left a six-year old son to whom an award is made, and a mother, Minnie Lambertson, who was found not to have been dependent upon the deceased at the time of the accident. An award was made to George W. Lambertson, Jr., son; to Charles F. Dalton, Esq., for counsel fees; to William Craft, undertaker; to Minnie Lambertson, as reimbursement for money paid local undertaker. Award denied to Minnie Lambertson, mother, as not dependent upon deceased at the time of said accident.

This claim came on for hearing before the State Industrial Commission at Newburgh, N. Y., on March 16, 1917; at its office.

No. 230 Fifth avenue, borough of Manhattan, city of New York, on May 4, 1917, May 10, 1917, and June 1, 1917; at Newburgh, N. Y., on July 2, 1917, and July 25, 1917; and at its office in New York city on September 28, 1917, on which latter date an award of compensation was made to the infant son and award of compensation was denied to the mother on the ground that proof of dependency had not been furnished. On November 3, 1917, at a hearing held before the Commission in New York city, an award was made for funeral expenses and also of counsel's fees. On December 3, 1917, this claim came on before the Commission on the motion of the insurance carrier for a rehearing, at which time the papers were referred to one of the Commissioners for review. On January 17, 1918, on the report of Commissioner Sayer, the application of the insurance carrier to have the case reopened was denied.

Robert W. Bonynge, counsel to State Industrial Commission.

Amos H. Stephens, attorney for employer and insurance carrier.

Charles F. Dalton, attorney for George W. Lambertson, Jr., and Minnie Lambertson.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law, award and decision as follows:

On July 13, 1916, the day when George Lambertson received the injuries which resulted in his death on August 6, 1916, he resided at No. 84 Grove street, Newburgh, N. Y., and was employed by Orange County Traction Company, engaged in the operation of a railway operated by electric power. George Lambertson was employed as a conductor of an electric car.

On July 13, 1916, George Lambertson was working for his employer at Walden Village, N. Y., and while engaged in the regular course of his employment, while attempting to fix a trolley-pole under a hook on the roof of the electric car, and while

he had one hand on the rope-guard and the other hand on the trolley-pole, he received an electric shock which threw him from the top of the car to the ground and he landed across a rail, striking the lower part of his back in the region of the kidneys, and sustained injuries which resulted in his death on August 6, 1916. After the accident George Lambertson was rendered unconscious but after a couple of days he returned to work and remained at work for about four days, when he was obliged to quit work. His death was due either to heat prostration following the debilitation caused by his fall, or to nephritis, either chronic actuated by his fall, or to acute caused by his fall.

The average weekly wage of George Lambertson was the sum of seventeen dollars.

Due notice of injury and due notice of death were given to the employer.

George Lambertson left him surviving George W. Lambertson, Jr., son, aged six years, the claimant herein, to whom an award of compensation is made; and Minnie Lambertson, mother, who is found not to have been dependent upon George Lambertson at the time of the accident.

Award of compensation is hereby made against Orange County Traction Company, employer, and the Travelers' Insurance Company, insurance carrier, to George W. Lambertson, Jr., aged six years, son of George Lambertson, deceased employee, at the rate of two dollars and fifty-five cents weekly until he shall arrive at the age of eighteen years; and a further award of seventy-five dollars counsel's fee to Charles F. Dalton, Esq., for legal services rendered, which is to be paid to him in addition to the amount previously paid and is hereby made a lien upon the compensation due at the present time; and a further award of one hundred dollars to cover funeral expenses, of which eighty dollars is to be paid to William Craft, undertaker, and twenty dollars to Minnie Lambertson to reimburse her for amount paid to local undertaker. Payment of compensation for George W. Lambertson, Jr., is to be made to his grandmother, Minnie Lambertson, the record showing that he has been legally adopted by said grandmother.

Award of compensation is hereby denied to Minnie Lambertson, mother of George Lambertson, deceased, on the ground that she was not dependent upon her son at the time of said accident.

The opinion of Commissioner Edward P. Lyon herein is adopted as the opinion of this Commission.

In the Matter of the Claim of CHARLES F. STRADAR, for Compensation under the Workmen's Compensation Law, against STERN BROS., Employer; EMPLOYERS LIABILITY INSURANCE COMPANY, Insurance Carrier

Case No. 70350

(Decided January 17, 1918)

Injuries sustained by Charles F. Stradar while employed as an upholsterer by Stern Bros.

The claimant, Charles F. Stradar, while employed as a carpet layer, was taking up an old carpet and relaying a new one and ran a rusty tack in his knee which resulted in an infection. The only question in this matter is as to whether carpet laying is within the meaning of the word "upholstering." The claimant was a member of the Carpet Upholsterers Union. *Held*, that carpet laying is one form of upholstering. An award was made.

The claimant was injured while engaged in taking up an old carpet and laying a new one. The sole question is whether the occupation of carpet laying is a hazardous employment under the law.

Claimant, in person.

W. L. Tufts, for the carrier.

SAYER, Commissioner.—This claimant, while taking up an old carpet and relaying a new one, ran a rusty tack in his knee, causing a wound which became infected and involved the leg.

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Carpet laying is not in specific language included in the law as a hazardous employment. Group 16 includes among other things "upholstering," and I think we may fairly conclude that upholstering includes carpet laying. The work is essentially alike in character, and the risks and hazards are much the same. The language of the statute is to be liberally construed. We may assume that the Legislature in using words to define the hazardous occupations used them in their ordinary acceptance in the various trades affected. The claimant was a member of Local No. 70 of the Carpet Upholsterers Union. The name of the trade organization with which he was identified, therefore, seems to have recognized carpet laying as upholstering.

I advise that an award be made of fourteen and one-half weeks and the case closed.

In the Matter of the Claim of JOHN DE GAGLIO, for Compensation under the Workmen's Compensation Law, against BRADLEY CONTRACTING COMPANY, Employer and Self-Insurer

Claim No. 75368

(Decided January 18, 1918)

Injuries sustained by John DeGaglio while employed as a timber foreman by the Bradley Contracting Company in the city of New York.

On August 12, 1914, John DeGaglio, while employed as a timber foreman by the Bradley Contracting Company of New York city, was injured by a piece of timber which fell and hit him on the left knee, producing "water on the knee" which resulted in ankylosis of the knee-joint and atrophy of the thigh muscles. His average weekly wage was the sum of twenty-three dollars and eight cents. An award was made.

This claim came on for hearing before the State Industrial Commission at its office, No. 230 Fifth avenue, borough of Manhattan, city of New York, on March 27, 1917, July 17, 1917, July 24, 1917, July 31, 1917, August 21, 1917, September 25, 1917, October 16, 1917, November 7, 1917, December 11, 1917, January 4, 1918, and January 18, 1918.

Robert W. Bonynge, counsel to State Industrial Commission.

Frederick L. C. Keating, attorney for employer and self-insurer.

Francis X. Mancuso, attorney for claimant.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law, award and decision as follows:

On August 12, 1914, the day when John DeGaglio received his injuries, he resided at No. 308 East One Hundred and Thirteenth street, New York city, and was employed by Bradley Contracting Company of No. 1 Madison avenue, New York city, engaged in the construction of a subway at Ninety-first street and Lexington avenue, New York city. John DeGaglio was employed as a timber foreman. He had been in the employ of Bradley Contracting Company for a period of over ten years.

On August 12, 1914, John DeGaglio was working for his employer at Ninety-first street and Lexington avenue, New York city, and while engaged in the regular course of his employment as a timber foreman, a piece of timber fell and hit him on the left knee, which injury caused synovitis of the knee, commonly known as "water on the knee," and resulted in permanent ankylosis of the knee-joint, with marked atrophy of the muscles of the thigh.

He remained at work until October 2, 1915, having been urged to stay on the job by his employer, during all of which time he was given a lighter job than he had prior to said accident, but at the same rate of wages.

The injuries he received on August 12, 1914, disabled him from October 2, 1915, to January 18, 1918, and on that date he was still disabled. If he had not been induced to remain at work and had not been given lighter work, he would have been disabled from practically the date of said accident.

Beginning on October 2, 1915, John DeGaglio received payments of fifteen dollars a week from his employer under an oral agreement made by his employer to pay the sum until he could

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return to work. Said weekly payments were continued until February 17, 1917, and upon the stopping of said payments John DeGaglio filed with this Commission a claim for compensation on March 5, 1917. After the filing of such claim by the claimant and on March 10, 1917, he was paid an additional sum of \$250, purporting to be in final settlement. The receipt for the \$250 paid on March 10, 1917, was on "form C-106" which recites that the payment was made by the employer under the provisions of the Workmen's Compensation Law.

The facts set forth in the opinion of Commissioner Henry D. Sayer are adopted herein with the same force and effect as if set out in full.

John DeGaglio filed with this Commission a claim for compensation on March 5, 1917, which was more than one year after the injury.

The conduct of the employer and self-insurer in continuing the claimant at work at his regular wages for a period of more than one year after he was accidentally injured, and in view of all the circumstances, directly induced the claimant to delay in filing a claim for compensation until after the expiration of the statutory period. In relying on the conduct of the employer and self-insurer, John DeGaglio acted as a prudent man might reasonably act under the circumstances.

The average weekly wage of John DeGaglio was the sum of twenty-three dollars and eight cents.

Bradley Contracting Company, employer and self-insurer, through their refusal or neglect, failed to file with the State Workmen's Compensation Commission a report in writing of said accident, as required by section 111 of the Compensation Law.

John DeGaglio did not give his employer written notice of injury within ten days after disability, but the head superintendent on the work had knowledge of the accident at the day of the happening thereof and one of the members of the employer firm had knowledge of the accident at least on the day that the disability occurred, that is, on the day claimant had to stop work, the claimant on that day having verbally notified James Bradley

of said accident; also the reasonable inference is that in giving the claimant lighter work after the accident, and in making payments hereinbefore referred to, that the employer had knowledge of the accident. Therefore, the employer and self-insurer was not prejudiced by such failure.

Award of compensation is hereby made against Bradley Contracting Company, employer and self-insurer, to John DeGaglio, injured employee, at the rate of fifteen dollars per week for a period of 115½ weeks from October 16, 1915, to January 4, 1918, and a further award of 2 weeks covering the period from January 4, 1918, to January 18, 1918, and this case is continued for further hearing. The employer and self-insurer is to be given credit on these awards for any amounts already paid to claimant. The employer and self-insured is instructed to pay into the cashier's office of this Commission an amount equal to the amount due to date, in order that said sum may be disbursed by the cashier of this Commission direct to the claimant.

The failure of John DeGaglio to give written notice of injury to his employer within ten days after disability is hereby excused on the ground that the employer and self-insurer was not prejudiced by such failure.

The employer and self-insurer is estopped to plead the Statute of Limitations in respect to the failure of the claimant to file his claim within one year after the injury since, by its conduct, whether fraudulent or not, it has directly induced the claimant to delay in filing his claim for compensation with the Commission until after the expiration of one year from the date of said accident.

The opinion of Commissioner Henry D. Sayer herein, and the opinion of Commissioner Edward P. Lyon in the case of O'Esau v. E. W. Bliss Company are adopted as the opinions of this Commission.

In the Matter of the Claim of JOHN C. DUTCHER, for Compensation under the Workmen's Compensation Law, against AMERICAN EXPRESS COMPANY, Employer and Self-Insurer

File No. 4068

(Decided January 30, 1918)

Injuries sustained by John C. Dutcher, while employed as a helper in the operation of an electric express truck by the American Express Company.

On December 8, 1916, John C. Dutcher, while employed as a helper in operating an electric truck, by the American Express Company, at the Union station in Albany, N. Y., was injured by a yard engine which backed up, striking the motor truck. The injuries necessitated the amputation of the four fingers of his left hand and resulted in the disabling of the thumb. By reason of these injuries there is a permanent loss of the use of the hand. His average weekly wage was the sum of fifteen dollars. An award was made.

This claim came on for hearing before the State Industrial Commission at its office at Albany, N. Y., on February 7, 1917, when an award was made of 5 weeks' compensation for temporary total disability from December 22, 1916, to January 26, 1917. On March 7, 1917, another award was made of 116 weeks for temporary total disability from January 26, 1917, to March 9, 1917. This case then came before the Commission on May 9, 1917, at which time the award of March 7, 1917, was rescinded and an award made for the equivalent loss of use of the right hand.

Thereafter this claim came on for hearing on August 2, 1917, on August 17, 1917, and on October 1, 1917, at New York city; and on October 17, 1917, January 15, 1918, January 28, 1918, and January 30, 1918, at Albany, N. Y., on which latter date the award as made for the equivalent loss of use of the right hand was affirmed.

Robert W. Bonynge, counsel to State Industrial Commission.

Visscher, Whalen & Austin, attorneys for employer and self-insurer.

A. Page Smith, attorney for claimant.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law and award as follows:

On December 8, 1916, the day when John C. Dutcher received his injuries, he resided at No. 77 Dove street, Albany, N. Y., and was employed as a helper in the operation of an electrically propelled express truck by American Express Company, engaged at the Union station in Albany, N. Y., in the operation, otherwise than on tracks, streets, highways or elsewhere, of trucks propelled by electricity.

On said date while John C. Dutcher was working for his employer at said Union station, and while engaged in the operation of an electrically propelled motor truck, a yard engine, which had been standing near by, backed up, striking the motor truck, causing John C. Dutcher to sustain certain injuries which, in addition to disabling him from the date of said accident to April 7, 1917, resulted in the amputation of all four fingers of his right hand, up to and including the greater portion of their proximal phalanges, leaving a stump with no ends of the fingers or separations between ends protruding over the stump. The thumb of the right hand sustained a fracture of the terminal phalanx which will result in some thickening due to the growth of callous. Also as a result of said accident, the muscles and tendons of the right thumb are somewhat shortened and have grown smaller, and there is a lack of full use of the thumb and inability to bring the thumb in conjunction with the palm of the hand, and the prehensile function of the hand is lost. By reason of the foregoing, there is a permanent loss of use of the right hand, considered as the equivalent loss of such hand.

The average weekly wage of John C. Dutcher was the sum of fifteen dollars.

Due notice of the accident was given to the employer.

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Award of compensation is hereby made against American Express Company, employer and self-insurer, to John C. Dutcher, injured employee, at the rate of ten dollars weekly for a period of 244 weeks for the equivalent loss of the right hand.

In the Matter of the Claim of MARGARET DALY, for Compensation under the Workmen's Compensation Law, against J. & J. G. WALLACH, Employers; ZURICH GENERAL ACCIDENT AND LIABILITY INSURANCE COMPANY, LTD., Insurance Carrier

Case No. 47450

(Decided February 4, 1918)

Injuries sustained by Margaret Daly while employed as an ironer by J. & J. G. Wallach in the city of New York.

On August 21, 1917, Margaret Daly, while employed as an ironer by J. & J. G. Wallach, engaged in the operation of a power laundry in the city of New York, fainted and fell and her right hand came in contact with an iron heater, resulting in burns of the fingers of that hand, disabling her for work from that date to December 29, 1917. Her average weekly wage was the sum of seven dollars and sixty-seven cents. An award was made.

This claim came on for hearing on November 30, 1917, at which time an award of compensation was made for fourteen and two-thirds weeks covering the period from August 21, 1917, to December 1, 1917. A notice of appeal was served from said award. Thereafter this claim came on for hearing on January 21, 1918, and February 4, 1918, on which latter date the award made on November 30, 1917, was affirmed and an award made for the period from December 1, 1917, to December 29, 1917.

Robert W. Bonyngé, counsel to State Industrial Commission.

Alfred W. Andrews, attorney for employer and insurance carrier.

Claimant, in person.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law, award and decision as follows:

On August 21, 1917, the day when Margaret Daly received her injuries, she resided at No. 249 East Seventy-seventh street, New York city, and was employed by J. & J. G. Wallach of No. 330 East Fifty-ninth street, New York city, engaged in the operation of a power laundry with a plant or place of business located at Nos. 330-332 East Fifty-ninth street. Margaret Daly was employed as an ironer in the family clothes department.

On said date Margaret Daly was working for her employers at her employers' plant, and while engaged in the regular course of her employment she fainted and fell and her right hand came in contact with an iron heater and she sustained burns of four of the fingers of said hand, which injuries disabled her from the date of said accident to December 29, 1917.

The average weekly wage of Margaret Daly was the sum of seven dollars and sixty-seven cents.

It does not appear whether written notice of injury was given to the employer within ten days after disability, but the employers were aware of the accident at the time of the happening and provided medical attention immediately. Therefore, neither the employer nor insurance carrier was prejudiced by such failure, if any.

Award of compensation is hereby made against J. & J. G. Wallach, employers, and Zurich General Accident and Liability Insurance Company, Ltd., insurance carrier, to Margaret Daly, injured employee, at the rate of five dollars and eleven cents per week, for fourteen and two-thirds weeks, covering the period from August 21, 1917, to December 1, 1917; and a further award of four weeks' compensation covering the period from December 1, 1917, to December 29, 1917.

The failure, if any, of Margaret Daly to give written notice of injury to her employers within ten days after disability is hereby excused on the ground that neither the employers nor insurance carrier was prejudiced by such failure, if any.

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In the Matter of the Claim of FRANK TWONKO, for Compensation under the Workmen's Compensation Law, against ROME BRASS AND COPPER COMPANY, Employer; AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, Insurance Carrier

Claim No. 35302

(Decided February 5, 1918)

Application by the American Mutual Liability Insurance Company for a rehearing.

On January 11, 1918, an application was made for an order granting a rehearing of the case and for the vacating of the award therein. On December 22, 1917, at Syracuse, N. Y., a similar application had been made which was denied. On the second application the question was raised that the claimant having died the record on an appeal to the Appellate Division should no longer indicate the claimant to be alive. The death of claimant makes some difference as to the amount of the award. Upon the questions raised recommended that the application be denied on the ground that it is clearly frivolous.

LYNCH, Commissioner.—At a hearing held January 11, 1918, the papers in this case were referred to me for review and recommendation. At said hearing an application was made for an order granting a rehearing and vacating the award herein. The insurance carrier making this application made a similar application before me on December 22, 1917, at Syracuse, which application was denied. The attorney for the insurance carrier distinguishes this second application from the application heard at Syracuse on the ground that the claimant herein is now dead and that the insurance carrier is unwilling to have the case passed upon in the Appellate Division with the record indicating the claimant to be alive. The attorney also states that unless the record on appeal shows that the claimant is now dead, the appellant would be unable to raise the point that the award would lapse upon the claimant's death.

The award in question covered the period from August 4, 1914, to August 21, 1917, or a period of over three years. The claim-

ant died on December 15, 1917. He had a right, during his lifetime, to receive the full amount of the award since it became due and payable prior to his death. The only limitation upon the absolute vesting in the claimant of the award is found in section 22 of the Compensation Law giving the Commission power to review an award and on such review to make an order ending, diminishing or increasing the compensation previously awarded. Death could neither terminate said award nor convert the vested interest of the claimant into a contingent interest. The award of the Commission became final and conclusive during the lifetime of the claimant. Unless reversed or modified on appeal, the award was as final and conclusive as a judgment obtained in the Supreme Court.

If the contention of the insurance carrier is correct that an award of compensation made to an injured employee and covering a specified period of disability lapses upon the death of the injured employee, occurring at a date subsequent to the date of the award and to the date of the disability covered by said award, and after the award had become vested, then it would only be necessary in order for the insurance carrier to avoid the payment of compensation, in many cases, to withhold the payment of an award under the protection of a notice of appeal and of the stay of proceedings incidental to such notice of appeal, until the claimant died; and in case it appear that the claimant would not die before the hearing and determination by the Appellate Division, dilatory motions could be made until the claimant died.

It is peculiarly interesting to observe that the insurance carrier intends to raise upon appeal herein such a question of law in view of the findings and decision of this Commission, in granting an award, holding that the insurance carrier was estopped in this case to plead the Statute of Limitations, since by its conduct it had directly induced the plaintiff to delay in filing his claim for compensation until after the expiration of the statutory period.

I recommend that the application of the insurance carrier be denied on the ground that such application is clearly frivolous. The insurance carrier is afforded ample protection in payment of the award herein by insisting upon the production of proper

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credentials and obtaining a proper receipt from either a duly authorized executor or administrator of the estate of Frank Twonko, deceased, or in the alternative of paying the amount of the award to this Commission for disbursement by the Commission.

In the Matter of the Claim of PETRINA TURANO, Widow, on Behalf of Herself and Infant Children, for Compensation under the Workmen's Compensation Law, for the Death of FRANK A. TURANO, against BUFFALO GENERAL ELECTRIC COMPANY, Employer; UTILITIES MUTUAL INSURANCE COMPANY, Insurance Carrier

Death Claim No. 19015-B

(Decided February 8, 1918)

Death of Frank A. Turano while employed as a cement finisher by the Buffalo General Electric Company at Buffalo, N. Y.

On March 3, 1917, Frank A. Turano, while employed as a cement finisher by the Buffalo General Electric Company, engaged in the construction of a power station and in the operation of electric power lines, dynamos or appliances and a power transmission line, and while at his regular work, was electrocuted. His average weekly wage was the sum of twenty-three dollars and eight cents. An award was made.

This claim came on for hearing before the State Industrial Commission at its office at Buffalo, N. Y., on May 25, 1917, and June 18, 1917; at its office, No. 230 Fifth avenue, borough of Manhattan, city of New York, on January 25, 1918, and February 8, 1918, on which latter date an award of compensation was made in accordance with the recommendations of Deputy Commissioner James McLusky. The attorney for the employer and insurance carrier has conceded in the brief filed with this Commission that the sole question to be decided in this case is whether the death of Frank A. Turano was due to an accident arising out of and in the course of his employment.

Robert W. Bonynge, counsel to State Industrial Commission.

Jeremiah F. Connor, attorney for employer and insurance carrier.

Frank A. Micelli, attorney for claimants.

By THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law, and award as follows:

On March 3, 1917, the day when Frank A. Turano received the injuries which resulted in his death, he resided at No. 165 Seventh street, Buffalo, N. Y., and was employed by Buffalo General Electric Company, engaged in the construction of a power station and in the operation of electric power lines, dynamos or appliances, and a power transmission line. Frank A. Turano was employed as a cement finisher at the power station located at Buffalo, N. Y.

On March 3, 1917, Frank A. Turano was working for his employer at the power-house above mentioned and while engaged in the regular course of his employment as a cement finisher he was electrocuted.

The average weekly wage of Frank A. Turano was the sum of twenty-three dollars and eight cents.

Due notice of death was given to the employer.

Frank A. Turano left him surviving his widow, Petrina Turano, aged thirty years; Catherine Turano, daughter, aged two years; and Francis Turano, posthumous son, born July 7, 1917, the claimants herein.

Award of compensation is hereby made against Buffalo General Electric Company, employer, and Utilities Mutual Insurance Company, insurance carrier, to the widow and minor children of Frank A. Turano, deceased employee, as follows: To Petrina Turano, widow, aged thirty years, at the rate of six dollars and ninety-two cents weekly during widowhood, with two years' compensation in one sum upon remarriage; to Catherine Turano,

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daughter, aged two years, and to Francis Turano, posthumous son, born July 7, 1917, at the rate of two dollars and thirty-one cents weekly to each until they shall respectively arrive at the age of eighteen years; and in case of the subsequent death of Petrina Turano, widow, then the payments to the children shall be proportionately increased until each shall be receiving a sum equal to 15 per cent of the above mentioned average weekly wage; and to Petrina Turano, widow, in the sum of one hundred dollars on account of the funeral expenses of Frank A. Turano, deceased.

In the Matter of the Claim of **GEORGE CLARKE**, for Compensation under the Workmen's Compensation Law, against **ROGER I. SHERMAN, INC.**, Employer; **FIDELITY AND CASUALTY COMPANY OF NEW YORK**, Insurance Carrier

Case No. S1289.

(Decided February 15, 1918)

Injuries sustained by George Clarke while employed as a laborer by Roger I. Sherman, Inc., at Waterville, N. Y.

On October 2, 1917, George Clarke, while employed as a laborer by Roger I. Sherman, Inc., a corporation engaged in the business of the canning of vegetables at Waterville, Oneida county, N. Y., and in connection therewith in the cultivation of lands for the purpose of raising vegetables to supply the needs of the canning business, was bending over in the act of bunching beans when the tine of a pitchfork in the hands of a fellow employee struck his left eye, causing a permanent loss of the use of such eye. The claimant was employed in various tasks in the cannery. On the date of the accident he had been sent by the cannery superintendent with other employees to help pull and bunch beans, grown by the company, to save them from frost, and had been employed for only two hours at the time of the accident. His average weekly wage was the sum of fourteen dollars and forty-two cents. An award was made.

This claim came on for hearing before the State Industrial Commission at its office at Syracuse, N. Y., on December 18, 1917, and January 2, 1918; at Utica on January 30, 1918, and at Syracuse on February 15, 1918.

Robert W. Bonynge, counsel to State Industrial Commission.

Nadal, Jones & Mowton, attorneys for employer and insurance carrier.

W. H. Weller, attorney for claimant.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law, and award as follows:

On October 2, 1917, the day when George Clarke received the injuries which resulted in the permanent loss of use of his left eye, he resided at Waterville, N. Y., and was employed by Roger I. Sherman, Inc., engaged in the business of canning of vegetables with a plant or place of business located at Waterville, Oneida county, N. Y., and in connection therewith in the planting and cultivating of ten acres of leased land for the purpose of raising vegetables to supply the needs of the canning business. George Clarke was employed as a laborer in the canning factory and on October 2, 1917, was required to assist in the gathering of beans on the land above mentioned.

From June, 1917, to the date of said accident, George Clarke was employed in the canning factory; from the beginning of the season until the last of August, 1917, during the pea season, he was in charge of the pea tables, and from the last of August until the date of said accident he operated a machine cutting corn from cobs, and when the corn was slow in arriving he was employed in the storeroom labelling. During the canning season of 1916, namely, from June until the last of December, George Clarke had been similarly employed by Roger I. Sherman, Inc.

The ten acres of leased land were situated about 100 rods from the cannery, and had been planted with red kidney beans; the seed had been carried from the factory by the employees thereof, and George Clarke had assisted in carrying some of said seed. On the date of said accident George Clarke had been sent by the superintendent of the cannery, with other fellow employees,

to help pull and bunch the beans to save them from the coming frost, and he had been so employed for a period of two hours prior to said accident.

On said date, George Clarke, while working for his employer, and while engaged in the regular course of his employment, and while performing an act incidental and requisite to the prosecution of and appropriate in the carrying forward of and supplying the needs of the canning business, and while bending over in the act of bunching beans, the tine of a pitchfork which was being handled by a fellow employee struck the left eye of George Clarke, injuring the same, and as a result of such injuries he sustained the permanent loss of use of said eye.

The employment in which George Clarke was engaged at the time of said accident was not farm labor within the meaning of the Workmen's Compensation Law.

Due notice of injury was given to the employer.

The average weekly wage of George Clarke was the sum of fourteen dollars and forty-two cents.

Award of compensation is hereby made against Roger I. Sherman, Inc., employer, and the Fidelity and Casualty Company of New York, insurance carrier, to George Clarke, injured employee, at the rate of nine dollars and sixty-one cents per week for a period of 128 weeks for the permanent loss of use of the left eye.

In the Matter of the Claim of ANTONIO LETTIERE for Compensation under the Workmen's Compensation Law, against THE DEGNON CONTRACTING COMPANY, Employer and Self-insurer

Case No. 21477

(Decided February 15, 1918)

Injuries sustained by Antonio Lettiere while employed as a foreman by the Degnon Contracting Company at New York City.

On June 30, 1916, Antonio Lettiere was employed as a foreman by the Degnon Contracting Company of New York city, a corporation engaged in subway construction in that city, when a wheeled push-car struck him

on the side, knocked him down and twisted him half way around, inflicting injuries which disabled him from the date of the accident until February 15, 1918, on which last date he was still disabled. By reason of a written agreement to pay compensation made between the employer and the claimant the employer is estopped from raising any question as to a failure to give written notice of injury. The average weekly wage of Antonio Lettiere was the sum of twenty dollars and nineteen cents. An award was made.

An agreement to pay compensation was entered into between the employer and claimant herein on July 20, 1916, for the payment of compensation on account of injuries received on June 30, 1916. On January 12, 1917, said agreement was duly approved and notice of award or approval of said agreement was mailed to each party. Thereafter this claim came on for hearing on March 13, 1917, and March 30, 1917, on which latter date an award of compensation was duly made.

Thereafter, this case came on for hearing on May 4, 1917; May 11, 1917; May 12, 1917; May 19, 1917; June 22, 1917; June 29, 1917; July 20, 1917; August 10, 1917; November 2, 1917; November 16, 1917; November 30, 1917; December 28, 1917; January 25, 1918; February 6, 1918, and February 15, 1918; on which latter date an award of compensation was made, from which this appeal has been taken.

Robert W. Bonyng, counsel to State Industrial Commission.

Frederick J. Flynn, attorney for employer and self-insurer.

James W. Bailey and Israel V. Werbin, attorneys for claimant.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law, award and decision as follows:

On June 30, 1916, the day when Antonio Lettiere received his injuries, he resided at No. 206 Fourth avenue, Brooklyn, N. Y., and was employed by the Degnon Contracting Company, of No. 30 East Forty-second street, New York city, engaged in sub-

way construction at Sixtieth street and Park avenue, New York city. Antonio Lettiere was employed as a foreman.

On said date Antonio Lettiere was working for his employer at Sixtieth street and Park avenue, New York city, and while engaged in the regular course of his employment a wheeled push-car knocked him down, striking him on the side and twisted him half way around, and he sustained injuries consisting of contusion of the pelvis and hip-joint, hematoma of buttock and sprain of leg—all on left side—and a sprain of the sacral spine, which injuries disabled him from the date of said accident to February 15, 1918, and on that date he was still disabled.

The average weekly wage of Antonio Lettiere was the sum of twenty dollars and nineteen cents.

It does not appear whether written notice of injury was given to the employer within ten days after disability, but the employer was aware of the accident and provided medical attention shortly thereafter and, therefore, the employer was not prejudiced by such failure, if any. By reason of the written agreement to pay compensation entered into on July 20, 1916, between the employer and claimant, the employer is estopped from raising any question in respect to the failure to give written notice of injury, if any.

Award of compensation is hereby made against the Degnon Contracting Company, employer and self-insurer, to Antonio Lettiere, injured employee, at the rate of \$13.46 per week for a period of thirteen weeks from November 17, 1917, to February 15, 1918, amounting to \$174.98, and this claim is hereby continued for further hearing.

The failure, if any, to give written notice of injury to the employer within ten days after disability is hereby excused on the ground that the employer and self-insurer was not prejudiced by such failure, if any. The employer and self-insurer is estopped from raising any question in respect to the failure to give written notice of injury within ten days after disability by reason of the written agreement to pay compensation entered into between the employer and claimant on July 20, 1916.

In the Matter of the Claim of HAROLD BAXTER, for Compensation under the Workmen's Compensation Law, against WALLER LIGHTERAGE COMPANY, Employer; UNITED STATES CASUALTY COMPANY, Insurance Carrier

File No. 40899

(Decided February 25, 1918)

Injuries sustained by Harold Baxter while employed as a barge captain by the Waller Lighterage Company at New York City.

On February 8, 1916, Harold Baxter was employed as a barge captain by the Waller Lighterage Company of New York city, a corporation engaged in the business of harbor transportation, when a cleat broke, catching his leg in a line between the rail of the barge and the cleat, resulting in injuries which disabled him from the date of the accident to October 2, 1917, and on that date he was still disabled. This case has been considered by the Commission several times. Receipts for compensation, under a form of agreement between the claimant and the employer but never signed by the employer, indicate that the compensation was paid to the claimant pursuant to said "report of agreement." On July 24, 1916, an award was made by the Commission to this claimant for a period of twenty-four weeks. From this award neither the employer nor insurance carrier appealed. Payments of further awards were subsequently made to the claimant up to August 27, 1917. On October 1, 1917, a further award was made and on appeal the award made on that date was rescinded and a new award was made. It is from this last award that this appeal is taken. The average weekly wage of Harold Baxter was the sum of twenty-three dollars and forty-three cents. An award was made.

Harold Baxter, the claimant herein, sustained his injuries on February 8, 1916. On March 20, 1916, a representative of the insurance carrier prepared in his own handwriting a form of report of agreement for the payment of such compensation as might be determined from the nature, extent, duration and result of the injuries sustained on February 8, 1916, and which compensation was to be paid in strict accordance with the Compensation Law. Said agreement was signed by the claimant and was also signed by the representative of the insurance carrier as a witness. The agreement was never signed by the employer but

the signature of the representative of the insurance carrier appears opposite the blank line left for the signature of the employer. The form of agreement was thus signed in duplicate and both duplicates were given to the claimant who took them to his employer. Said duplicate originals were received by the Commission on January 9, 1918, never having been filed with the Commission prior to that date, and never having been approved by the Commission. However, pursuant to said "report of agreement," the insurance carrier proceeded to pay compensation to the claimant herein at the agreed rate of fifteen dollars per week. The receipts for compensation forwarded to this Commission by the insurance carrier by letter dated March 24, 1916, indicate that the compensation was paid to the claimant pursuant to said report of agreement dated March 20, 1916.

On July 24, 1916, an award of compensation was duly made by the State Industrial Commission to Harold Baxter, injured employee, for a period of twenty-four weeks, and on July 26, 1916, a copy of notice of said award was duly served on the employer and insurance carrier pursuant to sections 20 and 23 of the Compensation Law, and no appeal has ever been taken therefrom by either the employer or insurance carrier.

On October 2, 1916, a further award of compensation for a period of four weeks was made, and on October 9, 1916, notice of said award was duly served on the employer and insurance carrier pursuant to sections 20 and 23 of the Compensation Law, and no appeal has ever been taken therefrom by either the employer or insurance carrier. Payments of compensation were continued to the claimant herein up to August 27, 1917.

On October 1, 1917, a further award of compensation was made Harold Baxter, injured employee, and from said award an appeal was taken. On February 25, 1918, the award made on October 1, 1917, was rescinded and a new award was made.

In the consideration of this claim, hearings were held before this Commission on July 24, 1916, October 2, 1916, October 1, 1917, November 16, 1917, November 19, 1917, November 26, 1917, December 14, 1917, and February 25, 1918.

Robert W. Bonynge, counsel to State Industrial Commission.

William H. Hotchkiss, attorney for United States Casualty Company.

Claimant, in person.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law, award and decision as follows:

On February 8, 1916, the day on which Harold Baxter received his injuries, he resided at No. 11 Clifford place, Brooklyn, N. Y., and was employed by Waller Lighterage Company of No. 39 Broadway, New York city, engaged in the business of harbor transportation. Harold Baxter was employed as a captain of the barge *Brown*.

On said date Harold Baxter was working for his employer and while engaged in the regular course of his employment as captain of the barge *Brown*, he sustained a compound fracture of his right leg by reason of the breaking of a cleat, by which his leg was caught in a line between the rail of the barge and the cleat, and which injuries disabled him from the date of said accident to October 2, 1917, and on that date he was still disabled.

The average weekly wage of Harold Baxter was the sum of twenty-three dollars and forty-three cents.

It does not appear whether written notice of injury was given to the employer within ten days after disability, but the employer was aware of the accident at the time of the happening thereof and provided medical attention immediately. Therefore, neither the employer nor insurance carrier was prejudiced by such failure, if any.

Award of compensation is hereby made against Waller Lighterage Company, employer, and United States Casualty Company, insurance carrier, to Harold Baxter, injured employee, at the rate of \$15 per week from August 22, 1916, to October 2, 1917, being for a period of fifty-eight weeks, amounting to \$870, and this claim is hereby continued for further hearing. The employer and

insurance carrier are to be credited with any and all payments made on account of said award, or during the period covered by said award.

The failure, if any, of Harold Baxter to give written notice of injury to his employer within ten days after disability is hereby excused on the ground that neither the employer nor insurance carrier was prejudiced by such failure, if any.

The opinions of Commissioner Edward P. Lyon in the case of Lanigan v. Standard Shipbuilding Corporation, 14 St. Dept. Rept. 623, and in the case of McCracken v. Eastern Gravel Corporation, Id. 659, are adopted as the opinions of this Commission; and a copy of the insurance policy covering the employer under the Compensation Law, together with a copy of the "report of agreement," are to be made part of the record on appeal.

In the Matter of the Claim of MARY EICHHORN, Widow, for Compensation under the Workmen's Compensation Law for the Death of EDDY EICHHORN, against FRANK KRAFFMEYER, Employer; GLOBE INDEMNITY COMPANY, Insurance Carrier

In the Matter of the Claim of ALBERT DEINLEIN, for Compensation under the Workmen's Compensation Law, against FRANK KRAFFMEYER, Employer; GLOBE INDEMNITY COMPANY, Insurance Carrier

Death File No. 562

(Decided February 26, 1918)

Injuries sustained by Eddy Eichhorn and by Albert Deinlein, resulting in the death of Eichhorn and the blinding of Deinlein, while both were employed by Frank Kraffmeyer in shellacking the inside of certain beer vats.

On December 3, 1915, Eddy Eichhorn and Albert Deinlein, while employed by Frank Kraffmeyer, who had a contract to shellac the inside of certain beer vats for the Lion Brewery, were at work with Kraffmeyer on the inside of the vats and had been at the work for several days, and at the close of that day, December third, when they had completed their day's work, both workmen as well as Kraffmeyer seemed to be in perfect health when they left the brewery, but Eichhorn died during the night

and Deinlein became totally blind the next day. The vats upon which they had been at work contained a manhole at the bottom, of sufficient size to allow a person to enter, and a small hole at the top. The method of doing the work was to scrape the vats, dry them and then sand-paper them, and afterward shellac them. The shellac was softened with wood alcohol, which is admitted to be a deadly poison. A hose was put into the vat through the bottom manhole and air pumped in. The accident was the result of wood alcohol poisoning. The only question before the Commission is whether either the death or the blindness can be traced to an industrial accident. It is claimed by the insurance carrier that the death and blindness in the present cases are traceable more nearly to an occupational disease than to an accident. *Held*, that the death in the one case and the blindness in the other were caused by the fact that the fumes were formed where the ordinary atmosphere could not carry them off and in such cases the results must be held to be traceable to an accident. Award made in each case.

Claim is made in the Eichhorn case by the wife of Eddy Eichhorn for compensation growing out of his death on December 4, 1915, as the result, it is claimed, of an industrial accident on December 3, 1915, and in the second case claim is made by Albert Deinlein for compensation growing out of an accident on the same day, as the result, it is claimed, of wood alcohol poisoning. The two workmen were in the employ of Kraffmeyer, who had taken the job to shellac certain beer vats for Lion Brewery upon the inside. These vats were large, contained a manhole at the bottom, of sufficient size to allow a person to enter, with a small hole at the top. The method of doing the work was to thoroughly scrape the vats, dry them and then sand paper them, and afterwards shellac them. The shellac was softened with wood alcohol, which is admitted to be a deadly poison. In order to carry off the fumes, a hose was put into the vat through the opening in the bottom and air pumped in. Kraffmeyer and his workmen had been working on this job for some days. They worked all of December third shellacking the inside of these vats without any apparent discomfort. They had completed their day's work and both of the workmen, as well as Kraffmeyer, seemed to be in perfect health when they left the brewery, but Eichhorn died during the night and Deinlein became totally blind the next day.

No question is raised but that the death in the one case and

blindness in the other were caused by the fumes of wood alcohol. It is, however, very seriously questioned whether either the death or the blindness can be traced to an industrial accident. This is the only question before us.

Daniel J. Ennis, for claimant.

F. A. W. Ireland, for insurance carrier.

LYON, Commissioner.—I have been informed that the Commission has already passed upon several cases of poisoning by wood alcohol. I have had the folders in all of these cases sent to my desk and I have carefully examined them all. So far as I can see these are the first cases which have come before the Commission of poisoning from the fumes of wood alcohol. The other cases, I think, without exception, were cases of actual contact of the person with the wood alcohol after an abrasion of the skin. It is claimed by the insurance carrier that the death and blindness in these cases are traceable more nearly to an occupational disease than to an accident, and it has troubled me not a little to determine whether an accident took place on December third.

The decision of these cases must, I think, run along lines parallel with those which frequently come before the Commission of death from heat prostration. I think it is held in most jurisdictions that if prostration from heat comes without any incident to accelerate the ordinary heat of the day, it cannot be held to be an industrial accident, but where anything is done to accentuate the heat of the day, as for instance, while working in the sunlight on burnished metal which attracts the heat, the unusual circumstance is held to be in the nature of an accident. *O'Dell v. Adirondack Electric Power Company* (not yet published). It is to be remembered that Mr. Kraffmeyer testified in these cases that he had been engaged in this sort of work for years and he never received any unfavorable effects from the use of wood alcohol, but it must also be remembered in these cases, the workmen were working in a small inclosure from which the atmosphere

was almost entirely excluded except such as was pumped in through the aid of a hose.

I think it must be found that the death in one case and the blindness in the other were caused by the fact that these deadly fumes were formed where the ordinary play of the atmosphere could not carry them off, and, therefore, as in the cases of heat prostration already spoken of, the death and blindness must be said to be traceable to an accident. I have not reached this conclusion without considerable hesitation. It seemed to me for a considerable time that the cause of the death and blindness in these cases was due to the fact that the workmen consented to enter an unhealthy place for the purpose of doing their work and that that could scarcely be said to be an accident. I think, however, that such a holding would place upon workmen the burden of the obvious risk of the employment which the Compensation Law was designed to throw off. I am, therefore, of the opinion that an award should be made in each case and I so advise.

On the 26th day of February, 1918, the Commission acted on the foregoing matter in accordance with the foregoing opinion.

In the Matter of the Claim of SAM MEZERITSKY, for Compensation under the Workmen's Compensation Law, against MEZERITSKY & MILLER, Employer; ZURICH GENERAL ACCIDENT AND LIABILITY INSURANCE COMPANY, Insurance Carrier

Case No. 37117

(Decided February 26, 1918)

Claim made by a physician and a hospital for medical services and hospital attendance growing out of an operation performed upon Sam Mezeritsky and necessitated by an accident for which compensation has already been awarded.

The original claimant is a brother of one of the employers and having been injured consulted Dr. Max Bresleu, his family physician, who advised an operation for a double hernia and that the operation be performed by Dr. Isaacs, the physician now seeking compensation. Dr.

Isaacs refused to operate except with the consent of the employing firm. He saw the employers and so stated, and some member of the firm authorized the operation. Subsequently Dr. Bresleu received from the firm a request to render necessary medical or surgical treatment to the injured man. This letter was typewritten, even to the signature. It was upon the letterhead of the firm and the typist who wrote it swore that she did so at the direction of one of the firm. The Zurich Insurance Company about this same time wrote the employers offering to pay for an operation by Dr. F. B. Doyle of Brooklyn, and stating that if the injured party went to any other physician or to any hospital except that designated by Dr. Doyle there would be no liability upon the company. As a matter of fact the operation was performed by Dr. Isaacs but in consultation with Dr. Bresleu. *Held*, that there is nothing in the insurance contract which deprives the employer and the employee from reaching an agreement as to who shall perform the operation even against the objections of the insurance carrier; that the physician is entitled to recover his bill as part of the employee's compensation under the decision of the Goldflam case, and that awards should be made in this case for the bill of Dr. Isaacs and the Beth Israel Hospital for the sums of \$201 and \$206.20 respectively, and that the doctor and the hospital should be given their liens upon the awards for the amount of their bills.

This is an application made by a physician for an award recovering for medical services and hospital attendance, growing out of an operation consequent upon an accident for which compensation has already been awarded. The Commission has already passed upon the reasonableness of the following bills for medical services and hospital attendance: Dr. I. R. Shapiro, \$26; Mr. E. Drinshtein, \$13; Dr. Bresleu, \$5; Dr. Balustein, \$1; Mr. M. Goodside, \$12; Dr. Henry E. Isaacs, \$201; Beth Israel Hospital, \$206.20.

The application now is for an award covering the bill of Dr. Isaacs and the Beth Israel Hospital for \$201 and \$206.20 respectively.

The award is resisted on two grounds: *First*, on the ground that there is no proper proof that medical attention was requested by the injured employee, and, *second*, because it is claimed that the insurance carrier offered medical treatment.

William Rabinowitz, for claimant.

E. W. Helm and Edward F. Lindsay, for insurance carrier.

LYON, Commissioner.—The claimant is a brother of one of the employers and after his injury consulted Dr. Max Bresleu, his family physician, who advised an operation for a double hernia and advised that the operation be performed by Dr. Isaacs. Dr. Isaacs refused to operate except with the consent of the employer and the witnesses state that communication was had orally with the firm of Mezeritsky & Miller, the employers, in which it was stated that Dr. Isaacs expected to operate and that some member of this firm authorized the operation. In conformity with this understanding, the following typewritten letter was written and either given or sent to the injured man, and was subsequently delivered to Dr. Isaacs:

“MEZERITSKY & MILLER

“Manufacturers of

“LADIES’ AND MISSES’ SUITS AND COATS

“28–30–32 West 27th St.,

“NEW YORK, *April 19th*, 1916.

“DEAR DOCTOR BRESLEU:

“You will kindly render necessary medical or surgical treatment to our employee Mr. Sam Mezeritsky. Our Insurance Carrier is the United States Fidelity & Guaranty Company.

“Respectfully yours,

“(signed) MEZERITZKY & MILLER.”

This letter is wholly typewritten including the signature. It will be noticed, however, that it is upon the letterhead of the employer and the bookkeeper and typist who wrote it was called to the stand and testified that she wrote it at the instance of one of the firm of Mezeritsky & Miller—she thought at the instance of Mr. Miller. In any event her testimony is positive that it was written at the instance of some member of the firm. Acting on the strength of this letter and of the conversations which preceded it, the operation was performed and the expense referred to incurred.

I think on all the testimony there can be no doubt but that the employer authorized Dr. Bresleu to render medical treatment

to the injured employee. I also think that the testimony shows that the firm understood and acquiesced in Dr. Isaacs doing the actual operation, although he is not named in the letter.

It appears that on or about April 12, 1916, the injured employee had an interview with a representative of the Zurich Insurance Company, in which they offered him orally, an operation at the hands of Dr. F. B. Doyle, and in pursuance of that conversation, the following letter was written to the employers by the Zurich Insurance Company:

" April 12, 1916.

" Messrs. MEZERITSKY & MILLER,

" 28 West 27th St.,

" New York City.

" GENTLEMEN.—*In re Sam Mezeritsky.* The above named injured party called at this office today for an examination. He advised us that he is in need of an operation.

" Without admitting any legal liability for his present condition, we wish to advise you that if he is desirous of an operation you should send him to Dr. F. B. Doyle, 145 Sixth Avenue, Brooklyn.

" This offer is made in conformance with Section 13 of the Compensation Law and if the injured party calls upon any other physician or surgeon or goes to any hospital except that designated by Dr. Doyle, there will be no liability upon this Company for the accident.

" Very truly yours,"

It is the claim of the insurance carrier that this offer of treatment at the hands of Dr. Doyle relieves it from the necessity of paying for medical treatment which this injured employee received. The question is, therefore, squarely presented whether after an injured employee has agreed with his employer upon the necessary treatment to be rendered and the selection of the physician to render it, the arrangement can be vetoed by the insurance carrier. Of course, the medical treatment which the employer offers must be adequate treatment, and while it is alto-

gether probable that the physician named in the above letter is a competent surgeon, there is not in the whole record the slightest proof of this competency.

I suppose there can be no question since the decision of the Goldflam case but that if the employer neglects to furnish necessary medical treatment after request by the employee, or if a physician renders medical treatment to an injured employee with the consent of the employer, the Commission has the right and the duty to make an award for the services as a part of compensation. It has often been argued that it is unfair to an injured employee that the statute does not give him the right to select his own physician at the expense of the employer, because the relation between a physician or surgeon and his patient is one calling for the exercise of extreme confidence and that the injured employee should have the right for that reason to select his own physician, but the statute and the decisions of the courts are to the contrary. It is still true, however, that the confidence which an injured man has in his surgeon or physician has very much to do with the success of the treatment and operation, and it would seem to be only natural for an employer who has due regard for the welfare of his employee to agree, so far as possible, with the employee upon a physician in whom he has confidence. All the more so, where the employer is a relative of the injured man. It seems to me that it would be the most natural thing in the world for Mr. Mezeritsky, the employer, in this case to acquiesce in the selection of a physician by his brother, the injured man, and I find nothing whatever in the statute which gives the insurance carrier the right to place his veto upon such an arrangement. If there be anything in the insurance contract which deprives the employer of the right to name the physician who should treat his injured employee, that is a matter to be adjusted between the insurance carrier and the employer. It can certainly have no force as against the injured employee. I can readily see how a man about to undergo as serious an operation as the employee in this case was subjected to, might be entirely unwilling to place himself in the hands of a doctor of whose ability he knew

nothing, and when he has selected a physician in whom he has confidence and has the consent of his employer for the use of that physician's services, I think the statute is completely satisfied and that the physician is entitled to recover his bill as a part of the employee's compensation under the decision in the Goldflam case, and that award should be made in this case for the bill of Dr. Isaacs and the Beth Israel Hospital for the sums of \$201 and \$206.20 respectively, and that the doctor and the hospital should be given their liens upon the awards for the amount of their bills.

On the 26th day of February, 1918, the Commission acted on the foregoing matter in accordance with the foregoing opinion.

In the Matter of the Claim of FRANCIS M. KENNEDY, for Compensation under the Workmen's Compensation Law, against CENTRAL CITY ROOFING COMPANY, Employer; STATE INSURANCE FUND, Insurance Carrier

Death Case No. 17450

(Decided February 27, 1918)

Circumstances under which a father and brothers and sisters can be held to have been dependents of a deceased worker.

The original proceeding herein was brought by Francis M. Kennedy for injuries received while employed by the Central City Roofing Company. Subsequent to the bringing of the proceeding the injured claimant died as a result of his injuries and under the same title the question as to the dependency of his father and of his two brothers and two sisters who survived him was investigated. The deceased earned eighteen dollars a week and paid to his employer three dollars a week on account of household supplies and also gave to his eldest sister, as the housekeeper, for the maintenance of the household, ten dollars each week. All of the brothers and sisters surviving him were under eighteen years of age. Another son merely paid his board at home at the rate of five dollars a week. The father earned nineteen dollars and fifty cents a week. He paid the employer each week some money on account of

household supplies furnished and also a weekly sum on account of the purchase price and interest on his home, which he had bought from his employer. The value of the house was \$1,500, of which he had paid \$600, and he was still paying interest on the unpaid balance as well as taxes. The balance of his wages went for household expenses. The younger children were all in school. For six months prior to the son's death the father had been ill and unable to work, although paid his wages regularly. The deceased son had been contributing thirteen dollars a week on an average to the family support. Very obviously the father's earnings alone would not have supported this large family of children in a decent manner, there being in all six children. In this State if there is a partial dependency that is continuing there should be compensation. The only question is, was the father earning enough to maintain himself and also those whom nature and the law have made his dependents. Under all the circumstances of this case recommended that an award be made to the father and to the four children. Adjustments of the compensation must be made so that the total shall not exceed 66 $\frac{2}{3}$ per cent of the wages, and readjustments as the children reach eighteen years. An award was made.

The question here is as to the dependency of father and brothers and sisters. Deceased was survived by a father and by two brothers and two sisters under the age of eighteen years.

The son earned eighteen dollars a week and paid to his employer three dollars a week on account of supplies furnished, such as coal, eggs and butter; and he also gave to his oldest sister who was the housekeeper for the benefit of the household ten dollars each week.

Another son worked but when home paid in only five dollars a week, which was for his board.

The father worked for the same employer as the deceased son, and had so worked for a number of years. He was paid nineteen dollars and fifty cents a week. He also paid some money to the employer each week on account of household supplies furnished by the employer and he also paid a small sum weekly on account of the purchase price and interest of his home which he had bought from his employer. He had paid in all about \$600 on account of the house, the value being about \$1,500. Interest on the unpaid balance, as well as taxes, had to be paid by the father. The balance of his wages he gave to his daughter for household expenses.

The younger children were all in school. It appears that for six months prior to the son's death, the father had been ill and unable to work, although paid his wages regularly.

Frank E. Malpass, for the claimants.

SAYER, Commissioner.—In my opinion, not only the children under the age of eighteen but also the father were in some measure dependent on this deceased's earnings. The young man appears to have been an excellent boy, hard working and contributing to the family on an average thirteen dollars a week, out of his eighteen dollars wages. Certainly the father's earnings alone would not have supported this large family of children in a decent manner.

The payment of three dollars each week to his employer on account of coal and food supplies was not for his benefit alone. It was for the benefit of the entire family. Further the payment of ten dollars to his sister for the house account was also in part for the benefit of the family. The other brother, whose wages were the same, paid in only five dollars a week, which was said to be the value of his board. On this basis, Francis, the deceased, might be held to have paid five dollars for board and the remainder of his contributions amounting to eight dollars a week may be taken as the measure of his support.

It is not necessary under our law that the family be wholly dependent on the earnings of the deceased. It is well settled under the law of the State that if there is a partial dependency, that is continuing, there should be compensation.

Some question is raised as to the dependency of the father, whose wages were nineteen dollars and fifty cents a week. It must be borne in mind here, I think, that the natural, legal and moral obligation for the support, maintenance and education of these children is upon the father. The father is the natural head of the family. To him society and the law looks for the support that nature demands. If owing to the exigencies of this particular case, and hundreds of others like it, the father is compelled to accept the help of his older children to discharge the

obligation which society casts upon him, then to the extent that the son shared the father's burden, the father was dependent upon the son. It is not an answer to say that the father was earning enough to feed and clothe himself. The question is, was he earning enough to maintain himself and also those whom nature and the law have made his dependents.

Here we have a father of a large family, with an equity of \$600 in a house that he has saved out of his earnings of some years. But he has a large balance still to pay on account of the house, together with interest and taxes. Who in these days will say that this house was an asset? Was it not rather a burden to add to his already heavy burden of responsibility? It seems so to me.

Moreover, the father appears to be in poor health and has received wages for a long time that he did not earn, and which were in reality in the nature of charity from the employer he had so long served.

Let an award be made in this case to the dependent father and to the four children. Adjustments of the compensation rate must be made so that the total shall not exceed 66 2/3 per cent of the wages, and readjustments as the children reach eighteen years.

On the 27th day of February, 1918, the Commission acted on the foregoing matter in accordance with the foregoing opinion.

In the Matter of the Claim of JOSEPH C. PECK, for Compensation under the Workmen's Compensation Law, against CALVIN T. ALLISON, Employer; GLOBE INDEMNITY COMPANY, Insurance Carrier

Albany File No. 30954

(Decided February 27, 1918)

Injuries sustained by Joseph C. Peck while employed as a carpenter by Calvin T. Allison.

On February 12, 1917, the claimant, Joseph C. Peck, while employed as a carpenter by Calvin T. Allison, cut his finger on a chisel. He

worked until March sixth of that year but he then had to stop and the

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finger was amputated. He lost some time on account of pain but did not lose an entire day except one. *Held*, that under the circumstances shown in this case the employer had due knowledge of the disability and that neither he nor the insurance carrier was prejudiced by want of such knowledge; that the loss of the finger came from infection and resulted from the injury of February twelfth. Award made to the claimant but award denied for the amount of the doctor's bill.

This claimant was employed as a carpenter and on February 12, 1917, cut his finger on a chisel. He worked on until March 6, 1917, when he had to stop and the finger was amputated. During that time he lost considerable time on account of the pain, but did not lose an entire day except one. No notice was given to the employer, who only came to the job once in a week or two, but on or about March sixth the employer received information as to the accident and was verbally notified either by the claimant or by his fellow employee.

Immediately after the injury, claimant received medical treatment from a doctor selected by himself. Previously, on or about February first, the claimant had cut his finger at home on a broken glass bottle. That cut had entirely healed at the time of the second cut.

Claimant in person.

G. E. Edwards and R. B. Cummings, for insurance carrier.

SAYER, Commissioner.—This claimant severely cut his middle finger while at work on February 12, 1917. The accident arose out of and in the course of his employment. As a result of such injury the finger became infected and subsequently was amputated.

A close question arises as to notice. No written notice was given to the employer. I find, however, that the employer had verbal notice and knowledge of the injury on or about March sixth or ninth. The claimant was compelled to stop work on March sixth, and therefore such knowledge was within ten days of disability. It is true that claimant lost some time prior to March sixth, but he worked as much as he was able, several

hours a day. He testifies that he was the only one on the job who knew how to operate the electric pump that was used on the job, and with commendable zeal for his employer's interest, as well as to earn such amount as he could, he continued at work for nearly a month. It is a most natural and usual thing for a workman to regard cuts and bruises lightly and to expect and hope they will terminate without serious consequences. None the less, this claimant procured prompt and concededly adequate medical attention.

Knowledge of the employer within ten days of disability may be held to be evidence of lack of prejudice and warrant the Commission in excusing failure to give notice. Workmen's Compensation Law, § 18. *Elsinger v. Remhof*, State Industrial Commission, decided in January, 1918. If in this case we were called upon to take into account the first fourteen days of disability, I think it would be contended, and properly so, that the fourteen days' waiting period began on March sixth, the day claimant was compelled to stop work, and not the days previously when he only lost part time.

It follows, therefore, that the employer had knowledge within ten days of disability, and that considering that fact and the added fact that claimant received adequate medical treatment, the employer and insurance company were not prejudiced.

The medical evidence is convincing that the infection and loss of the finger came from the injury of February twelfth. The fact that the employer had cut his finger some two weeks previously is negligible and is not to be taken into account. That prior injury had quite healed and cannot be called into account to defeat the claim.

An award for loss of the second finger or thirty weeks should be made and the case closed.

A different situation is presented as to the doctor's bill. The right to charge the employer with medical services depends upon a request by the employee of his employer, and the refusal of the latter to furnish such treatment as is required. No request was made, but it is sought to show that the employer would have had

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no objection to the doctor who was employed, had he been consulted in advance. I think that is not sufficient to bring the doctor's bill within the law. Section 13 of the law requires the request to be made. *Goldflam v. Kazmier & Uhl*, 181 App. Div. 140.

Award of the amount of the doctor's bill is therefore denied.

On the 27th day of February, 1918, the Commission acted on the foregoing matter in accordance with the foregoing opinion.

In the Matter of the Claim of MARY SCHMITT, Widow, on Behalf of Herself and Infant Daughters for Compensation under the Workmen's Compensation Law, for the Death of JOSEPH SCHMITT, against L. MIDDLEDITCH COMPANY, Employer; ALLIED MUTUALS LIABILITY INSURANCE COMPANY, Insurance Carrier

Death Case No. 71715

In the Matter of the Claim of JOSEPH SCHMITT, for Compensation under the Workmen's Compensation Law, against L. MIDDLEDITCH COMPANY, Employer; ALLIED MUTUALS LIABILITY INSURANCE COMPANY, Insurance Carrier

Claim No. 55881

(Decided March 1, 1918)

Injuries sustained by Joseph Schmitt, resulting in his death, while employed as a pressman by L. Middleditch Company, printers, in the city of New York.

On February 10, 1915, the injuries on account of which this claim was originally made occurred. On that date Joseph Schmitt, the original claimant, while employed by the L. Middleditch Company, engaged in the printing business in New York city, as a pressman in the operation of a printing press, was lifting sheets from the press when the platform on which he was standing slid from under him, causing him to fall and strike a bench, causing contusions, together with a severe strain, and resulting in the development of bladder trouble from which he died

on January 1, 1918, a long time after he had brought the original claim herein. An award was made to him for these injuries, which disabled him from February 18, 1915, to June 14, 1915, on which date he returned to work though not fully recovered from his injuries. Subsequently he was served with notice of a hearing for adjustment of claim to be presented to the Commission on June 29, 1915, and returned such notice to the Commission with the indorsement thereon, filed under date of July 1, 1915, stating that he had not recovered from the injuries but would be obliged to undergo another operation. He worked from June 14, 1915, until October 5, 1917, when he was again obliged to quit on account of his said injuries, and was disabled from the said 5th day of October, 1917, up to the time of his death on January 1, 1918. From the time of his accident until his death he gradually failed in health. The average weekly wage of Joseph Schmitt was the sum of twenty-three dollars and eight cents. He left him surviving a widow and two daughters, each of the latter being less than eighteen years of age, as his dependents.

The claim was reopened on December 28, 1917, on the application of Joseph Schmitt, for the reason that he was obliged to quit work on October fifth of that year on account of his injuries. After the death of the claimant several hearings were had before the Commission in January, February and March, 1918, for the purpose of considering both the claim for disability and the claim filed by the widow on behalf of herself and infant daughters on account of the death of Joseph Schmitt. An award of compensation was made covering the period of disability from October 5, 1917, to December 31, 1917, together with an award to the widow and infant daughters and to Michael Dirkes, undertaker, for funeral expenses of deceased. An application for leave to reopen the cases made by the insurance carrier was denied on March 14, 1918.

The injuries which resulted in the death of Joseph Schmitt were sustained on February 10, 1915. A claim for compensation was duly filed by Joseph Schmitt on account of the injuries sustained, and hearings were duly held thereon before this Commission at its New York office on April 15, 1915, April 29, 1915, May 3, 1915, May 11, 1915, May 17, 1915, June 9, 1915, and June 29, 1915. Awards of compensation were duly made on account of said disability up to and including June 14, 1915, the day on which Joseph Schmitt returned to work, he having returned to work although not fully recovered from his injuries. Thereafter, on December 28, 1917, said claim was reopened on application of the claimant for the reason that he was obliged to quit work on October 5, 1917, on account of his injuries. Joseph

Schmitt died on January 1, 1918, as result of the injuries sustained on February 10, 1915; and thereafter hearings were duly held before this Commission on January 4, 1918, February 1, 1918, February 15, 1918, and March 1, 1918, for the purpose of considering both the claim for disability and claim filed by widow on behalf of herself and infant daughters on account of the death of Joseph Schmitt. On March 1, 1918, an award of compensation was made in the disability case covering the period from October 5, 1917, to December 31, 1917, together with an award of compensation to the widow and infant daughters. On March 14, 1918, the application of the insurance carrier to reopen these cases was denied.

Robert W. Bonynge, counsel to State Industrial Commission.

Arthur Butler Graham, attorney for employer and insurance carrier.

Mary Schmitt, widow, claimant in person.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact and award, as follows:

On February 10, 1915, the day when Joseph Schmitt received the injuries which resulted in his death on January 1, 1918, he resided at No. 407 Suydam street, Brooklyn, N. Y., and was employed by L. Middleditch Company of 65 Duane street, New York city, engaged in the business of printing. Joseph Schmitt was employed as a pressman in the operation of a printing press in said business.

On said date, Joseph Schmitt was working for his employer at his employer's plant, and while engaged in the regular course of his employment, while operating a printing press and while lifting sheets from the press, the platform on which he was standing slid from under him, causing him to fall and to strike a bench, causing contusions of the sacro iliac joint and the lower part of the scrotum, and other injuries, together with a severe strain, which injuries caused the development of carcinoma of the prostate and bladder and resulted in his death on January 1, 1918.

The injuries thus sustained disabled him from February 18, 1915, to June 14, 1915, on which date he returned to work although he had not fully recovered from the injuries received, as appears from the statement signed by him in the form of objections and indorsed on the back of a notice of hearing for adjustment of claim to be presented to the Commission on June 29, 1915, which said notice was mailed him on June 24, 1915, and returned with said indorsement and filed with the Commission on July 1, 1915, in which he states that he had not recovered from the injuries, but would be obliged to undergo another operation. He remained at work from June 14, 1915, until October 5, 1917, when he was obliged to quit work on account of the injuries received on February 10, 1915, and he was disabled from said October 5, 1917, until his death, January 1, 1918. From the date of said accident until the date of his death he gradually failed in health.

The average weekly wage of Joseph Schmitt was the sum of twenty-three dollars and eight cents.

Due notice of injury and due notice of death were given to his employer in each instance.

Joseph Schmitt left him surviving Mary Schmitt, widow, aged thirty-six years; and Mary Schmitt, daughter, aged fifteen years, and Muriel Schmitt, daughter, aged six years, the claimants herein.

Award of compensation is hereby made against L. Middleditch Company, employer, and Allied Mutuals Liability Insurance Company, insurance carrier, to Mary Schmitt, aged thirty-six years, widow of Joseph Schmitt, deceased employee, at the rate of six dollars and ninety-two cents weekly, during widowhood, with two years' compensation in one sum upon remarriage; and to Mary Schmitt, daughter, aged fifteen years, and to Muriel Schmitt, daughter, aged six years, at the rate of two dollars and thirty-one cents weekly, to each until they shall respectively arrive at the age of eighteen years; and to Michael Dirkes, undertaker, in the sum of one hundred dollars on account of the funeral expenses of Joseph Schmitt, deceased.

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Award of compensation is further made against L. Middleditch Company, employer, and Allied Mutuals Liability Insurance Company, insurance carrier, for the period of disability from October 5, 1917, to December 31, 1917, being twelve and one-half weeks at the rate of \$12.18 per week, amounting to \$152.25, which said award is to be paid to the estate of Joseph Schmitt, deceased.

In the Matter of the Claim of JOSEPH SCHULER, for Compensation under the Workmen's Compensation Law, against CHARLES PETROLL, Employer; EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD., Insurance Carrier.

Case No. 33737

(Decided March 11, 1918)

Injuries sustained by Joseph Schuler, while employed as a butcher by Charles Petroll in the city of New York, engaged in operating a meat market.

On November 1, 1916, Joseph Schuler, while working for his employer at the latter's place of business in the city of New York, and while lifting beef, strained himself and sustained a double inguinal hernia which compelled him to quit work on January 10, 1917, and undergo an operation on the following day. He was disabled from working from January 10, 1917, to January 4, 1918, except that for a few weeks during that period he was able to return to work at full wages. The only question involved herein is as to the correctness of the determination of the average weekly wage. The amount determined by the Commission to be the weekly payment of compensation was fourteen dollars and sixty-seven cents instead of fourteen dollars and six cents, as paid by the employer and insurance carrier. Upon all the evidence submitted before the Commission, *held*, that the average weekly wage of Joseph Schuler was the sum of twenty-two dollars. An award made for the period from October 4, 1917, to November 30, 1917, amounting to one hundred and seventeen dollars and seventeen cents, from which is to be deducted the fifty-five dollars earned for two and one-half weeks that claimant was able to return to work within that period, leaving a balance due of sixty-two dollars and seventeen cents, being at the rate of fourteen dollars and six cents a week. A further award made of sixty-one cents a week from January 24, 1917, to November 30, 1917, being the difference between the weekly payment of compensation actually paid and the amount as determined by the Commission, together with a further award.

The only question raised by the employer and insurance carrier before this Commission was the correctness of the determination of the average weekly wage. This claim came on for hearing on November 30, 1917, at which time an award of compensation was made for the period from October 4, 1917, to November 30, 1917. It developed at this hearing that compensation had been paid by the employer and insurance carrier on October 4, 1917, at the rate of fourteen dollars and six cents a week. The Commission determined the average weekly wage of the claimant under subdivision 3 of section 14 to be twenty-two dollars a week, and therefore, the weekly compensation payments were determined to be fourteen dollars and sixty-seven cents instead of fourteen dollars and six cents, as paid by the employer and insurance carrier. The claimant testified that he had worked two and a half weeks at the full rate of wages between October 4, 1917, and November 30, 1917, and accordingly the award of compensation was for but eight and one-third weeks, together with an award of sixty-one cents weekly due claimant weekly from January 24, 1917, to November 30, 1917, being the difference between the amount paid him for that period, and the amount due him on the basis of twenty-two dollars a week, average weekly wage. Thereafter, this claim came on for further consideration on January 21, 1918, on motion of the insurance carrier, at which time the representative of the insurance carrier stated that compensation had been paid to January 5, 1918, and the award made on November 30, 1917, was affirmed, and a further award was made for the period from January 5, 1918, on which date the claimant returned to work at reduced earning capacity to January 19, 1918, at two dollars and sixty-seven cents per week, being two-thirds of the difference between his average weekly wages and his wage earning capacity during that period. Thereafter, on March 11, 1918, this claim came on for further consideration, at which time a further award of compensation was made from January 19, 1918, to the date of said hearing, at the rate of two dollars and sixty-seven cents a week during the continuance of partial disability, under subdivision 4 of section 15 of the Compensation Law.

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Robert W. Bonynge, counsel to State Industrial Commission.

Bertrand L. Pettigrew, attorney for employer and insurance carrier.

Claimant in person.

By THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, award and decision, as follows:

On November 1, 1916, the day when Joseph Schuler received his injuries, he resided at No. 1745 Amsterdam avenue, New York city, and was employed by Charles Petroll of No. 4208 Broadway, New York city, engaged in the operation of a meat market at said address. Joseph Schuler was employed as a butcher.

On November 1, 1916, Joseph Schuler was working for his employer at his employer's place of business and while engaged in the regular course of his employment, while lifting beef, he strained himself and sustained a double inguinal hernia, which required him to quit work on January 10, 1917, and to undergo an operation on January 11, 1917. Following a double Bassini operation, it was necessary that he be catheterized and pyelonephritis resulted. By reason of the injury sustained he was disabled from working from January 10, 1917, to January 4, 1918, except that he was able to return to work at full wages for a period of two and one-half weeks between October 4, 1917, and November 30, 1917; from January 4, 1918, to March 11, 1918, he suffered temporary partial disability and as a result of the injury he suffered decreased earnings so that his wage earning capacity was reduced to the sum of eighteen dollars a week for that period, whereas, at the time of the injury he was earning twenty-two dollars a week; and on March 11, 1918, he was still partially disabled.

The average weekly wage of Joseph Schuler was the sum of twenty-two dollars, which is determined under subdivision 3 of section 14 of the Compensation Law.

It does not appear whether written notice of injury was given

to the employer within ten days after disability, but it has not been established as a fact that claimant failed to comply with section 18; and it is, therefore, presumed under section 21 that sufficient notice was given. By written agreement entered into between the employer and injured employee dated March 6, 1917, both the employer and insurance carrier are estopped to raise any question in respect to the failure, if any, to give written notice of injury.

Award of compensation is hereby made against Charles Petroll, employer, and Employers' Liability Assurance Corporation, Ltd., insurance carrier, to Joseph Schuler, injured employee, for the period of eight and one-third weeks from October 4, 1917, to November 30, 1917, amounting to one hundred and seventeen dollars and seventeen cents, from which is to be deducted the fifty-five dollars earned for the two and one-half weeks that claimant was able to return to work between October 4, 1917, and November 30, 1917, at the full rate of wages, leaving a balance due of sixty-two dollars and seventeen cents being at the rate of fourteen dollars and six cents a week; further awarded to Joseph Schuler the sum of sixty-one cents per week for the period from January 24, 1917, to November 30, 1917, being the difference between the weekly payment of compensation made by his employer and insurance carrier for that period, and the sum of fourteen dollars and sixty-seven cents, the compensation rate based upon the average weekly wage of twenty-two dollars a week as determined by this Commission under subdivision 3 of section 14; further awarded to Joseph Schuler at the rate of two dollars and sixty-seven cents a week from January 5, 1918, to March 11, 1918, which sum represents $66\frac{2}{3}$ per centum of the difference between his average weekly wages or twenty-two dollars and his wage earning capacity thereafter or eighteen dollars during said period; and this claim is hereby continued for further hearing.

By reason of the written agreement entered into between the employer and injured employee herein, both employer and insurance carrier are estopped to raise any question in respect to the failure, if any, to give written notice of injury within ten days after disability.

In the Matter of the Claim of MARIA L. WHITE, Dependent Mother, on Behalf of Herself and MARY WHITE and CATHERINE WHITE, Dependent Sisters, for Compensation under the Workmen's Compensation Law, for the Death of EDWARD J. WHITE, against THE ARGUS COMPANY, Employer; TRAVELERS' INSURANCE COMPANY, Insurance Carrier

Death File No. A-244

(Decided March 13, 1918)

Injuries sustained by Edward J. White, resulting in his death, while employed as an elevator operator by the Argus Company, at Albany, N. Y.

On September 4, 1917, Edward J. White, while employed as an elevator operator by the Argus Company, engaged in the business of printing in the city of Albany, N. Y., and while in the regular course of his employment in operating an electric elevator, fell down the elevator shaft. His body was found in the bottom of the shaft, death resulting from a fractured skull caused by falling an unknown distance. There were no eye witnesses to the accident. The average weekly wage of Edward J. White was the sum of twelve dollars. The decedent left him surviving as his only dependents his mother and two sisters under the age of eighteen years. Awards made.

This claim came on for hearing before the State Industrial Commission at its office at Albany, N. Y., on November 1, 1917, January 2, 1918, and March 13, 1918.

Robert W. Bonynge, counsel to State Industrial Commission.

Amos H. Stephens, attorney for employer and insurance carrier.

John J. McManus, attorney for claimants.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact and award, as follows:

On September 4, 1917, the day when Edward J. White

received the injuries which resulted in his death, he resided at No. 140 Orange street, Albany, N. Y., and was employed by the Argus Company engaged in the business of printing, and in connection therewith in the operation of freight and passenger elevators. Edward J. White was employed as an elevator operator.

On said date Edward J. White was working for his employer at his employer's plant located at Broadway and Beaver street, Albany, N. Y., and while engaged in the regular course of his employment, while operating an electric elevator, he fell down the elevator shaft. His body was found in the bottom of the shaft, he having been killed as a result of a fractured skull caused by falling an unknown distance — there having been no eye witnesses. When the body was found the elevator car was at the fifth or top floor of the shaft. A short time prior to the finding of his body he had been seen in the car operating the elevator.

At the time of said accident Edward J. White was of the age of sixteen years. He had begun work as a messenger and had later been promoted to elevator operator. As he progressed in the same employment his wages on his arriving at his majority and prior thereto under normal conditions would have increased. The average weekly wage of Edward J. White at the time of the injury and death, taking into consideration the fact that under normal conditions his wages would be expected to increase, is determined at twelve dollars.

Edward J. White left him surviving no wife or child under the age of eighteen years, but left surviving Maria L. White, aged forty-eight years, mother dependent upon him at the time of said accident, and also two sisters, Mary White, aged eleven years, and Catherine White, aged fourteen years, both dependent upon him at the time of said accident, the claimants herein.

Due notice of death was given to the employer.

Award of compensation is hereby made against the Argus Company, employer, and Travelers' Insurance Company, insurance carrier, to Maria L. White, dependent mother, aged forty-eight years, at the rate of \$2.885 weekly during dependency; to Mary White, dependent sister, aged eleven years, and to Catherine

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White, dependent sister, aged fourteen years, at the rate of \$1.731 weekly to each until they shall respectively arrive at the age of eighteen years; and to Joseph F. Harrigan the sum of \$100 on account of the funeral expenses of Edward J. White, deceased.

In the Matter of the Claim of CATERINA DI FEO ACOCCELLA, Widow, on Behalf of Herself and Minor Children, for Compensation under the Workmen's Compensation Law for the Death of ANGELO MARIO ACOCCELLA, against JOHN IMPERIALE, Employer; MASSACHUSETTS BONDING AND INSURANCE COMPANY, Insurance Carrier

Claim No. 40744

(Decided March 13, 1918)

Injuries sustained by Angelo Mario Acocella, resulting in his death, while employed as a rock laborer by John Imperiale in the city of New York.

On August 26, 1916, Angelo Mario Acocella, while employed by John Imperiale as a laborer in the excavating of rock at Grand Boulevard and One Hundred and Eighty-first street, New York city, was lifting an iron beam, together with other employees, when the beam slipped from a saw-horse and fell upon his right leg, resulting in a comminuted fracture requiring an operation for Lane plating. This operation resulted in a slight shortening of the leg, stiffening of the ankle joint and a defect in walking, which disabled him from the date of the accident to August 28, 1917, the date of his death. The severity of the injury lowered the vitality of Angelo Mario Acocella. At the time of the injury tuberculosis existed in some degree and the anaesthetic required at the operation on the leg caused an additional irritation in a previously diseased organ, which was a contributing factor in making more active the dormant tuberculosis which already existed, and which resulted in his death. The average weekly wage of Angelo Mario Acocella was the sum of fourteen dollars and forty-two cents. He left him surviving his widow and two minor sons under eighteen years of age. Awards made.

The injuries which resulted in the death of Angelo Mario Acocella occurred on August 26, 1916. Thereafter awards of

compensation were duly made to the injured employee on March 5, 1917, March 27, 1917, and on May 1, 1917, covering in all the period up to April 29, 1917. Thereafter the claim for compensation for disability came on for hearing on September 11, 1917, at which time the representative of the insurance carrier advised the Commission that the claimant had died from pulmonary tuberculosis. Thereafter the claim on account of death came on for hearing on December 20, 1917, January 17, 1918, and March 13, 1918, on which latter date an award of compensation was duly made to the widow and infant children.

Robert W. Bonyng, counsel to State Industrial Commission.

Nellis & Nellis, attorneys for employer and insurance carrier.

Italian Consul, representing claimants.

BY THE COMMISSION.—All the evidence before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, award and decision, as follows:

On August 26, 1916, the day when Angelo Mario Acocella received his injuries, he resided at No. 2478 Arthur avenue, New York city, and was employed by John Imperiale, of No. 566 East One Hundred and Eighty-seventh street, New York city, engaged in the business of excavation at Grand boulevard and One Hundred and Eighty-first street, New York city. Angelo Mario Acocella was employed as a rock laborer.

On said date Angelo Mario Acocella was working for his employer at the location above mentioned and while engaged in the regular course of his employment, while lifting an iron beam, together with other employees, the beam slipped from a saw-horse and fell upon his lower right leg causing a comminuted fracture of the tibia, which required an operation for Lane plating, which resulted in a slight shortening of the leg with marked restriction of motion of the ankle joint and a resultant defective walking, and which disabled him from the date of said accident to August 28, 1917, the date of his death. The severity

of the injury lowered the vitality of Angelo Mario Acocella. At the time of said injury tuberculosis existed in some degree, and the general anæsthetic administered at the time of the operation on his leg caused an additional irritation in a previously diseased organ, which, together with the lowering of the vitality on account of the severity of the injury, were contributing activating factors calling into play dormant tuberculosis which existed prior to and at the time of said accident and which resulted in his death on August 28, 1917.

The average weekly wage of Angelo Mario Acocella was the sum of fourteen dollars and forty-two cents.

Angelo Mario Acocella left him surviving Caterina di Feo Acocella, widow, aged thirty-one years, and Michele Angelo Acocella, son, aged seven years, and Vito Acocella, son, aged four years, the claimants herein.

It does not appear whether written notice of death was given to the employer within thirty days thereafter, but the employer was aware of the death within thirty days, as appears from minutes of September 11, 1917; therefore, neither the employer nor insurance carrier was prejudiced by the failure, if any, to give written notice of death within thirty days thereafter. On the other hand, it has not been established as a fact that claimants have failed to comply with section 18 of the Compensation Law, and it is, therefore, presumed under section 21 that sufficient notice of death was given.

Award of compensation is hereby made against John Imperiale, employer, and Massachusetts Bonding and Insurance Company, insurance carrier, to the widow and minor children of Angelo Mario Acocella, deceased employee, as follows: To Caterina di Feo Acocella, widow, aged thirty-one years, at the rate of four dollars and thirty-three cents weekly during widowhood, with two years' compensation in one sum upon remarriage; to Michele Angelo Acocella, son, aged seven years, and to Vito Acocella, son, aged four years, at the rate of one dollar and forty-four cents weekly to each until they shall respectively arrive at the age of eighteen years; and in case of the subsequent death of

Caterina di Feo Acocella, widow, then the payments to the children shall be proportionately increased until each shall be receiving a sum equal to 15 per cent of the above mentioned average weekly wage.

The failure, if any, to give written notice of death to employer within thirty days thereafter is hereby excused on the ground that neither the employer nor insurance carrier was prejudiced by such failure, if any.

In the Matter of the Claim of MARY E. WOOLLEY, Mother, for Compensation Under the Workmen's Compensation Law, for the Death of IRVING WOOLLEY, against GENEVA CUTLERY COMPANY, Employer; AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, Insurance Carrier

Albany File No. 18487

(Decided March 14, 1918)

Injuries sustained by Irving Woolley, resulting in his death, while employed by the Geneva Cutlery Company.

An award was made to Mary E. Woolley, the mother of the deceased, for compensation growing out of his death in January, 1917, the award being made in May, 1917, from which award an appeal was taken to the Appellate Division which affirmed the decision. The present application is made by the insurance carrier to vacate the award, notwithstanding the decision of the Appellate Division, on the ground that subsequent investigation shows that the testimony was either not full or explicit, or not properly understood by the Commission. *Held*, that no reason appears in the papers for vacating the award affirmed by the Appellate Division; that deceased was about his employer's business when injured and was so engaged with the knowledge and assent of his employer, and the motion to vacate the award must be denied.

An award was made to the claimant in this case as the mother of Irving Woolley for compensation growing out of his death in January, 1917. Said award was made in May, 1917, and from it an appeal was taken to the Appellate Division, where the same was affirmed. The insurance carrier now makes application to have the award vacated notwithstanding the affirmance by

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the Appellate Division, on the ground that subsequent investigation shows that the testimony given on the hearing of the case was either not full or explicit, or not properly understood by the Commission.

Geo. F. Ditmars and W. S. McGreevy, for claimant.

W. R. Lipscomb, for insurance carrier.

LYON, Commissioner.—The award which was made and affirmed was based in part on the following testimony: "Q. You are connected with the Geneva Cutlery Co.? A. Yes. Q. In what capacity? A. General Manager and Treasurer. Q. At the time of the injuries received by Irving Woolley he was employed by your Company? A. Yes, sir. Q. And the injuries received were received while he was in your employ? A. Yes, sir. Q. Did he ever go back to work after the injury? A. No, never left the hospital. Q. Was it Mr. Woolley's custom to go down for mail at noon time? A. It was, yes, sir. Q. And it was often the custom to use your machine to go backwards and forwards? A. It was, yes, he was in the habit of meeting the driver there and get the mail, then ride up. Q. Of course that was done with the knowledge of yourself? A. Yes, we knew they were using the car. Q. Was the mail heavy? A. Not apt to be, no. Q. What was his general work? A. He was in the order department at the factory. Q. Was he operating the automobile? A. No. Q. But you used the automobile for him to go after the mail and bring it back in the automobile? A. Yes."

The Commission found that "In the course of his employment he was required to go for mail daily to and from the post office, a distance of one and one-quarter miles each way from the plant, and was provided with transportation to and fro by his employer in an automobile owned by his employer and operated by a fellow employee. On said date while Irving Woolley was returning from the post office in the automobile with mail, in the course of his employment, the car of his employer in which he was riding skidded from the street railway tracks on account

of the icy street, striking the curb and throwing him to the ground, resulting in his death."

The vacation of the award is now asked upon an affidavit in which it is stated that Mr. Henry wrote the insurance carrier, as follows:

"Acknowledging yours of the 18th inst., I wish to advise receipt of copy of testimony, and from my reading of page 24 and page 45, there is an apparent discrepancy between my statement and the conclusion.

"The word 'duty' was not mentioned in any of my testimony. It was not the duty of Mr. Woolley to get the mail, nor was it the duty of any one in the office to get the mail. The facts are that some of the office-boys did get the mail occasionally, but it was the duty of the licensed chauffeur to bring the mail up. This chauffeur was in the habit of meeting some of the boys from the office at the Post-office and these boys evidently made a custom of meeting the chauffeur often getting the mail from the Post-office and riding back to the plant with him.

"The above, I believe, will explain fully the discrepancy in question."

"(Signed) GENEVA CUTLERY COMPANY,
"H. L. HENRY, *Manager*."

I cannot find in the papers any reason for vacating an award which has passed the scrutiny of the Appellate Division. It is true the affidavit states that facts now brought forward by Mr. Henry were not ascertained until after the hearing in the Appellate Division, but there is no reason stated why the facts should not have been known, and I can see no reason why the case should be re-tried *de novo* because Mr. Henry did not make himself fully understood by the insurance carrier when the case was tried. Moreover, I do not see how from Mr. Henry's testimony already quoted, any other decision could be made than the one which was made. It may be that it was not the duty of Mr. Woolley to get the mail, but on Mr. Henry's sworn statement it was the custom for him to do so, as his employer well knew,

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and he was using his employer's automobile in doing so. The business of the employer is one of the hazardous occupations enumerated in the statute, and subdivision 4 of section 3 of the Workmen's Compensation Law gives coverage to all the employees of an employer whose principal business is that of carrying on or conducting a hazardous employment upon the premises or at the plant or in the course of his employment away from the plant of his employer. Mr. Woolley was surely about his employer's business at the time when he was injured and was so engaged with the knowledge and assent of his employer, and I think the motion to vacate the award must be denied.

On the 14th of March, 1918, the Commission acted on the foregoing matter in accordance with the foregoing opinion.

In the Matter of the Claim of BEULAH F. NOLAN, Widow, for Compensation under the Workmen's Compensation Law, for the Death of GEORGE NOLAN, against GEORGE F. SHEVLIN MANUFACTURING COMPANY, Employer, H. D. ELIASON, Trustee; STANDARD ACCIDENT INSURANCE COMPANY and ZURICH GENERAL ACCIDENT AND LIABILITY INSURANCE COMPANY, Insurance Carriers

Albany Death File No. 18677

(Decided March 14, 1918)

Application by the Zurich General Accident and Liability Insurance Company, in a case where claimant is entitled to compensation, for a determination that the policy issued by said company has been cancelled and that the Standard Accident Insurance Company should be looked to for the amount of the award.

It is admitted that the claimant, Beulah F. Nolan, widow, is entitled to compensation for the death of George Nolan, the only question at issue being which of two insurance carriers is liable for the payment of the award. Prior to the date of the accident the Zurich General Accident and Liability Insurance Company issued its policy of insurance to the George F. Shevlin Manufacturing Company. The latter com-

pany became involved in financial difficulties and a Mr. Eliason was appointed receiver in bankruptcy in November, 1915, and a little later was appointed trustee in bankruptcy for the same company. An attempt was made thereafter to formally cancel the insurance policy under the provisions of subdivision 5 of section 54 of the Workmen's Compensation Law. Mr. Eliason, as trustee, thereafter took out a policy of the Standard Accident Insurance Company and this policy was in force at the time of the accident. The consideration of this case was delayed pending the result of an appeal to the Court of Appeals in the case of Hargraves v. George F. Shevlin Manufacturing Company, and in line with that decision this case was decided by the Commission so as to hold both insurance companies liable under their policies and making an award against both. The Zurich General Accident and Liability Insurance Company now, however, applies for a rehearing on the ground of additional evidence in this case not covered by the Hargraves case. *Held*, that under the facts shown the application to have the award vacated must be denied and the award made by the deputy affirmed.

Claim is made by the widow of George Nolan for compensation for herself and minor child for his death on November 8, 1915, as the result of an industrial accident. There is no doubt that the claimant is entitled to compensation. The only question to be decided is, which of the two insurance carriers is liable for the payment. The Zurich General Accident and Liability Company issued its policy of insurance to the George F. Shevlin Manufacturing Company prior to the date of this accident. The George F. Shevlin Manufacturing Company got into financial difficulties and Mr. Eliason was appointed receiver in bankruptcy on or about November 1, 1915, and thereafter on or about November 24, 1915, was appointed trustee in bankruptcy for the said company. After the appointment of Mr. Eliason some attempt was made to have the policy changed to cover the risk as receiver and trustee, but without avail, and thereafter some attempt was made to formally cancel the policy, pursuant to subdivision 5 of section 54 of the Workmen's Compensation Law. Thereafter the policy of the Standard Accident Insurance Company was issued to Mr. Eliason and was in force at the time of the accident.

The case of Hargraves v. George F. Shevlin Manufacturing Company was decided by this Commission some months ago, and the Commission found that both insurance companies were liable

under their policies and made an award against both, and the Commission's decision has been affirmed both by the Appellate Division and by the Court of Appeals. Thereafter, this case came on for hearing before one of our deputies and an award has been made, apparently on the strength of the decision in the Hargraves case. In fact the decision of this case had been held up for some time in order to get the ruling of the Court of Appeals in the Hargraves case, and it seems to have been generally understood that the decision of that case would make the law for this and some other cases. However, there was no stipulation that this case should abide the event of the Hargraves case, and the Zurich General Accident Insurance Company has made application for a rehearing, on the ground that it now has evidence to produce in this case which was not produced in the Hargraves case, showing that they are not liable under their policy of insurance. The testimony has been taken and it now comes on for a final determination.

Claimant in person.

Edward F. Lindsay, for Zurich General Accident and Liability Insurance Company.

Neile F. Towner, for Standard Accident Insurance Company.

LYON, Commissioner.— It is strenuously insisted by the representative of the Standard Accident Insurance Company that the Commission ought not to disturb the award made by the deputy, on the ground that it has all the time been understood that the decision of the Hargraves case should be controlling in this case. It is no doubt true that all parties supposed that the Hargraves decision would make the law for this case, but the Zurich General Accident and Liability Company having discovered what it supposes to be additional testimony which should make a different decision in this case from that of the Hargraves case, I do not think it should be debarred from making the attempt. If a mistake in the proof was made in the Hargraves case, there is no reason why the insurance company should be compelled to per-

petuate that mistake in other cases, at least in the absence of a direct stipulation that the other cases should abide the event of the Hargraves case.

I do not think the new proofs substantiate the claim of the Zurich Company that it succeeded in making a formal cancellation of its policy of insurance. It is strenuously insisted, however, by that company that its policy of insurance terminated by action of law when the title to the property of the Shevlin Manufacturing Company passed in bankruptcy proceedings to Mr. Eliason, as receiver and trustee in bankruptcy. I confess that this position appeals to me as a matter of law with a good deal of force. I had always supposed that it was fundamental to all kinds of insurance that an insurance policy could only be enforced by the particular person to whom it was issued and that any change in ownership either by contract or by operation of law voided the policy in the absence of a consent of the insurer to substitute a new purchaser or owner. Subdivision 3 of section 54 of the Compensation Law is as follows:

"3. Insolvency of employer does not release the insurance carrier. Every such policy shall contain a provision to the effect that the insolvency or bankruptcy of the employer shall not relieve the insurance carrier from the payment of compensation for injuries or death sustained by an employee during the life of such policy."

It hardly seems to me that this provision was intended to change the fundamental theory of all insurance and cause a policy of insurance to run to an entirely different person than the one to whom it was issued. I should have supposed that the life of the policy terminates with the transfer of interest of the insured. I am unable to see how Mr. Nolan can have been an employee of the Shevlin Manufacturing Company after that company had been adjudicated bankrupt and had its assets transferred to a trustee. However, I am of the opinion that the question is not open here but that the decision of the Hargraves case on this point is conclusive upon this Commission. There was proof in the Hargraves case that Mr. Hargraves' injury hap-

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pened after the bankruptcy of the Shevlin Manufacturing Company and while Mr. Eliason was in charge as either receiver or trustee in bankruptcy, and the Appellate Division and Court of Appeals both held that the Zurich was liable under its policy. Thus, in the Hargraves case it appears on page 5 of the Court of Appeals record that the accident to Mr. Hargraves happened on the 17th day of December, 1915, and on page 14 of that record it appears that Mr. Eliason was appointed receiver in bankruptcy on September 1, 1915, and trustee in bankruptcy on the 24th of November, 1915, so that the question was squarely presented by the record in the Hargraves case. It is claimed by the representative of the Zurich Insurance Company that this point was not briefed or argued in either the Appellate Division or the Court of Appeals and that it was therefore probably overlooked, but the testimony in the Hargraves case was stipulated into the record in the present case.

We, therefore, have a case here where the proofs are identical with the proofs submitted in a case which has passed the scrutiny of both the Appellate Division and the Court of Appeals, and while it may be true that through some oversight the court's attention was not called to the legal situation of the Zurich Company, growing out of the bankruptcy of the Shevlin Manufacturing Company, it does not seem to me that this Commission can take the view that those courts overlooked the point, but that the remedy of the Zurich Company, if it have any, is by an appeal to those courts where the questions can be presented *de novo* and where the oversight can be corrected, if it be one. I think, therefore, that the application of the Zurich to have the award vacated must be denied and the award made by the deputy must be affirmed.

On the 14th day of March, 1918, the Commission acted on the foregoing matter in accordance with the foregoing opinion.

Commissioners Sayer and Lynch do not concur as to the bankruptcy policy, and ask to go on the record as holding that the policy continue in force until the company sees fit to make any proper cancellation in the case.

In the Matter of the Claim of MILO STRAIGHT, for Compensation under the Workmen's Compensation Law, against DAVID W. STEARNS, Employer; EMPLOYERS LIABILITY INSURANCE COMPANY, Insurance Carrier

Albany Death File No. 35549

(Decided March 14, 1918)

Injuries sustained by Milo Straight, resulting in his death, while hauling timber in the woods for David W. Stearns.

The deceased, Milo Straight, was employed by Edward Wakeley to work at two dollars a day as a driver in hauling lumber out of woodlands being lumbered by Wakeley for David W. Stearns, the owner of said lands. Wakeley in securing help in taking out the lumber practically acted as foreman on the job. Stearns, the lumberman, carried workmen's compensation insurance; Wakeley, who was a farmer, and in the matter of taking out the lumber was a foreman, did not have such insurance. *Held*, that while Wakeley, in hiring Straight, became his general employer, to whom he could look for his wages, nevertheless as the business of lumbering was a hazardous one that the hazard of the business was the obligation of Stearns, who was the special employer. Stearns knew this and for that reason had taken out compensation insurance in compliance with the law. *Held*, also, that both Straight and Wakeley were for the time being employees of Stearns, the special employer, and either of them might look to Stearns for compensation for injuries received in the course of that employment. An award was made.

Milo Straight was killed while hauling timber in the woods for David W. Stearns. The accident occurred on June 21, 1917. The employment was covered by the Compensation Law, and the accident arose out of and in the course of such employment.

Stearns was a lumberman and during the season employed numbers of men in the woods and at the mill. He employed as a foreman in the woods Edward Wakeley, a farmer of the locality, who was accustomed to going into the woods each year in the logging season. Wakeley had authority to obtain the necessary

men, and he hired Milo Straight, a driver, who had formerly been employed by him on his farm, to work at two dollars a day. Stearns also rented a team from Wakeley. Straight was to drive the team, and Wakeley was paid five dollars a day for the team and driver, and board for the driver. Out of the five dollars was to be paid Straight's wages of two dollars. It appears that on at least one day the deceased worked in the mill and was not engaged in driving.

It appears that while Straight had at various times worked for Wakeley, he had not been so employed for about one month prior to the time he was hired to go into the woods.

Stearns, the lumberman, carried workmen's compensation insurance. Wakeley, the farmer, and acting foreman on the job, did not.

W. L. Tufts and A. B. Ahearn, for the Employers Liability Insurance Company.

Frank D. Morehouse, for Edward Wakeley.

SAYER, Commissioner.—It is contended here that this is a case of a general and special employer and that the Commission should award the compensation against the general employer. Wakeley, the foreman, who rented his team and driver to Stearns, was the general employer. The business upon which they were engaged was the business of Stearns, the lumberman. The hazard of the employment was the hazard of Stearns' business. The accident was that of a falling log and is an accident more connected with a lumbering operation than with that of farming or of driving a vehicle. Stearns, the special employer, knew his employment was hazardous and he complied with the law by securing the payment of compensation to his workmen. Wakeley, the general employer, was for the purpose of this lumbering operation the foreman and agent of Stearns. He directed Straight's work, but not as Straight's employer, but rather as the foreman for Stearns. Wakeley himself was working for wages for Stearns.

As an employee may under the common law of master and servant look to his general employer for his wages, and to his special employer for damages for negligent injuries, so under the Workmen's Compensation Law he may so far as its provisions are applicable look to the one or to the other, or to both, for compensation for injuries due to occupational hazards, and this Commission may make such an award as the facts in the particular case may justify. *Matter of Denoyer v. Cavanaugh*, 221 N. Y. 273; *Miller v. North Hudson Contracting Co.*, 166 App. Div. 348.

It is true that this Commission has in some instances awarded compensation against the general employer, as the Court of Appeals has said in *Matter of Denoyer*, *supra*: "The Industrial Commission, therefore, has full power to make an award against the general employer. It does not follow that by the application of this rule the special employer is not to be held in any case. * * * If the men are under the exclusive control of the special employer in the performance of work which is a part of his business, they are, for the time being, his employees."

In this particular case, both the injured employee and the general employer himself, were for the time being employees of Stearns, the special employer, and either of them might look to Stearns for compensation for injuries received in the course of that employment.

It appears from the testimony that in the vicinity in which this accident occurred in the conduct of the lumbering industry, practically seventy-five per cent of the teams supplied on lumbering jobs are furnished by the farmers in the neighborhood, and that the farmers owning and supplying such teams do not customarily carry compensation insurance on the drivers of the teams supplied. On the contrary, it is customary for the lumbermen to insure such risks.

In the case of *Sullivan v. Preston*, 177 App. Div. 110, the local custom of hiring workmen in the lumbering business was considered as controlling.

Moreover, the general employment of Straight by Wakeley was

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an employment at farm labor, which industry is specifically excluded from the Compensation Law.

The hazardous business was that of Stearns. The profit in the business was to go to him.

I am of the opinion that the facts and circumstances in this case justify an award against Stearns, and I so advise.

On the 14th day of March, 1918, the Commission acted on the foregoing matter in accordance with the foregoing opinion.

In the Matter of the Claim of MARY K. WOODRUFF, Widow, for Compensation under the Workmen's Compensation Law, for the Death of JOHN C. WOODRUFF, against L. K. COMSTOCK, Employer; TRAVELERS' INSURANCE COMPANY, Insurance Carrier

Case No. 38787

(Decided March 14, 1918)

Injuries sustained by John C. Woodruff, resulting in his death, while employed by L. K. Comstock in hoisting iron pipe.

On March 19, 1917, the deceased was engaged with one Meltcher in hoisting, by means of a block and fall, four-inch iron pipes about ten feet long. Meltcher, who was in the basement of the premises where they were at work, attached the pipes to a rope and Woodruff, on the fifth floor, was swinging the pipe onto the floor, both men pulling on the other end of the rope which passed through the block and fall. The pieces of pipe weighed about 160 or 170 pounds each. When the pipe had been lifted to about the level of the fifth floor Woodruff shouted "All right" and was about to swing the pipe onto the floor when the pipe suddenly fell to the basement with such force as to lift the other man completely off his feet. On investigating Woodruff was found on the fifth floor dead. The deceased had not been in good health but apparently died from heart trouble. The question here is as to whether his death was the result of an industrial accident. *Held*, that the lifting of one-half of the weight of this pipe involved a heavy strain and the bad heart condition was increased by this strain, bringing the life of the workman to a close at an earlier period than would otherwise have been the case. An award was made.

The claimant asks for compensation as widow of John C. Woodruff, growing out of his death on March 19, 1917, as the result, it is claimed, of an industrial accident. Mr. Woodruff was engaged with one Barney Meltcher on said day in hoisting with a block and fall four inch iron pipes about ten feet long. These pipes were attached to a rope in the basement, and Mr. Meltcher in the basement and Mr. Woodruff on the fifth floor were lifting same by pulling on the other end of the rope which passed through the block and fall. These pieces of pipe were about 160 or 170 pounds each. The two men had hoisted pipe in this manner to about the level of the fifth floor when Mr. Woodruff shouted "All right," and was apparently about to swing the pipe on to the floor when Meltcher felt the pipe fall to the basement with such force that he said it lifted him right off his feet. Not receiving any answer to his call as to what was the matter, Meltcher went to the fifth floor and found Mr. Woodruff lying on the floor apparently dead. The death certificate gives the cause of death as "chronic endocarditis." Dr. Kevin, a physician who had attended Mr. Woodruff for some months before and operated upon him for stone in the bladder, was of the opinion, although there was no autopsy, that the death was due to acute dilatation of the heart. Mr. Woodruff had not been in robust health for some months, as was evidenced by the serious operation that Dr. Kevin performed. He made, however, a fair and uneventful recovery, but seems to have been troubled with a bad heart for some time. The only question to be decided is whether there is proof that Mr. Woodruff died as the result of an industrial accident.

Claimant in person.

E. A. Willoughby, for insurance carrier.

LYON, Commissioner.— It is quite true, as the insurance carrier claims, that there must be some convincing proof that the cause of death was due to an accident, and that the Commission cannot

presume, in pursuance of section 21 of the Compensation Law, that an accident happened, but I think under the circumstances enumerated here and under the decision of the courts and of the Commission, we are warranted in finding that Mr. Woodruff's death was due to an accident.

The case of Collins against the Brooklyn Union Gas Company is not to the contrary, for in that case there was no evidence that Mr. Collins had done anything which caused the heart failure. In the present case, there is evidence that Mr. Woodruff was engaged just prior to his death in helping hoist pieces of very heavy iron pipe. Mr. Meltcher testified that he saw him loading the pipe, and his falling dead at the instant, I think, must be found to be the result of this unusual exertion.

I have no doubt that had Mr. Woodruff been a healthy man with a normal heart, the exertion could have been had with perfect safety, but we have to deal with the injured man as he actually stood, and if a previously diseased heart was overburdened by the momentary exertion it is, I think, an accident within the meaning of the Compensation Law.

The case of Kucera v. Dalton Machine Works is not to the contrary. That case was reversed by the Appellate Division, and subsequently dismissed by the Commission, not for failure of proof of an accident, but for failure to give the notice required by section 18 of the Compensation Law.

The case of Hurley v. Consolidated Dental Manufacturing Company was dismissed because there was no proof that Mr. Hurley strained himself.

The present case is not unlike the case of Gorton v. Eastern Kodak Company, decided by the Commission on April 11, 1917, Vol. 2, p. 150. In that case Mr. Gorton, who had been for a long time afflicted with heart trouble, had lifted a heavy core of film and had afterward gone into the next room and brought out an empty core and fell, bursting the aorta. In that case it was there said: "There is no direct evidence of any accident, and if an accident is to be connected as the cause of his death it must be so connected by drawing inferences from the

conceded facts. There can be no doubt, it seems to me, that the lifting of one-half of a film weighing 350 or 360 pounds is a pretty severe exertion for a well man and that it was an extraordinary exertion for a man in the physical condition in which Mr. Gorton was at the time. * * * The circumstance which to my mind makes this case compensatable is the fact that death followed almost immediately a heavy strain. * * * The fact that Mr. Gorton was afflicted with heart disease long before the time of his death does not prevent the case from being compensatable, provided the Commission finds, as I think it should in this case, that the previous diseased condition was accelerated by the accident, bringing the life of the workman to a close at an earlier period than would otherwise have been the case."

I think the reasoning applies with equal force to this case, and I, therefore, advise that an award be made.

On the 14th day of March, 1918, the Commission acted on the foregoing matter in accordance with the foregoing opinion.

In the Matter of the Claim of ELIZABETH BROCKELBANK, Widow,
on Behalf of Herself and Minor Children, for Compensation
under the Workmen's Compensation Law for the Death of
WILLIAM J. BROCKELBANK, against EDWARD FUNK, Employer;
GLOBE INDEMNITY COMPANY, Insurance Carrier

Case No. 41223

(Decided March 14, 1918)

Injuries sustained by William J. Brockelbank, resulting in his death, while employed by Edward Funk as a helper on an ice wagon.

On August 2, 1917, William J. Brockelbank, who was employed as a helper on an ice wagon by Edward Funk, in the city of New York, was engaged in the regular course of his employment when he became affected by the heat and fell out of the wagon in which he was riding with his employer. Upon being taken to a hospital he was found to be suffering from heat stroke, and later developed delirium tremens during which he jumped from a window of the hospital and died as a result of such

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delirium on August 6, 1917. The average weekly wage of William J. Brockelbank was the sum of fourteen dollars and forty-two cents. Decedent left him surviving as his only dependents his widow and three sons and a daughter, all under the age of eighteen years. Awards made.

William J. Brockelbank was a helper on an ice wagon on August 2, 1917. While riding on the wagon, his employer driving at the time, he complained of the heat and not feeling well. It was the hottest day of the year. His employer suggested that he ride in the back of the wagon where it was cooler; that they would go over to the dock and get a load of ice and that probably he would feel better then. Shortly thereafter Brockelbank fell out of the back of the wagon and was picked up in a semi-conscious condition and an ambulance called. He was taken to a hospital and the case diagnosed as heat prostration. He later developed delirium tremens and jumped from a window of the hospital to a roof of an adjoining building. Thereafter, and on August 6, 1917, he died, the cause of death being given as heat stroke—delirium tremens.

This claim came on for hearing before the State Industrial Commission at its office, No. 230 Fifth avenue, New York city, on November 28, 1917, December 5, 1917, January 14, 1918, January 24, 1918, and March 14, 1918.

Robert W. Bonyng, counsel to State Industrial Commission.

Robert M. McCormick, attorney for employer and insurance carrier.

Claimants in person.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, award and decision, as follows:

On August 2, 1917, the day when William J. Brockelbank received the injuries which later resulted in his death, he resided at No. 459 St. Marks avenue, Brooklyn, N. Y., and was employed by Edward Funk, engaged in the ice business, and in connection

therewith in the operation of trucks and wagons drawn by horses. William J. Brockelbank was employed as a helper on an ice wagon.

On said date William J. Brockelbank was working for his employer, and while engaged in the regular course of his employment, he was affected by the heat and fell out of the wagon; he was either thrown out by a jounce by reason of his weakened condition or the excessive heat of the day overcame him and he fell from the wagon and onto the street. He was thereafter taken to a hospital where he was found to be suffering from heat stroke, and later developed delirium tremens and died as a result thereof on August 6, 1917. Delirium tremens is sometimes caused by shock and sometimes it is produced by heat. It cannot be determined with reasonable certainty in this case whether the delirium was produced by the heat or by the fall, but probably both were contributing factors.

The average weekly wage of William J. Brockelbank was the sum of fourteen dollars and forty-two cents.

It does not appear whether written notice of death was given to the employer within thirty days thereafter, but it has not been established as a fact that such notice was not given, and it is, therefore, presumed under section 21 of the law that sufficient notice was given.

William J. Brockelbank left him surviving Elizabeth Brockelbank, widow, aged thirty-seven years; William J. Brockelbank, son, aged ten years; Harold Brockelbank, son, aged eight years; Arthur Brockelbank, son, aged six years, and Margaret Brockelbank, daughter, aged three years, the claimants herein.

Award of compensation is hereby made against Edward Funk, employer, and Globe Indemnity Company, insurance carrier, to the widow and minor children of William J. Brockelbank, deceased employee, as follows: To Elizabeth Brockelbank, widow, aged thirty-seven years, at the rate of four dollars and thirty-three cents weekly during widowhood, with two years' compensation in one sum upon remarriage; to William J. Brockelbank, son, aged ten years; to Harold Brockelbank, son, aged eight years; to Arthur Brockelbank, son, aged six years, and to

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Margaret Brockelbank, daughter, aged three years, at the rate of one dollar and thirty-two cents weekly to each until they shall respectively arrive at the age of eighteen years; and in case of the subsequent death of Elizabeth Brockelbank, widow, then the payments to the children shall be proportionately increased until each child shall be receiving a sum equal to 15 per cent of the above-mentioned average weekly wages; and if the payment to the widow shall otherwise cease, or if the payments to any child cease by operation of law or otherwise, then the payments to each of the remaining children shall be increased to 10 per cent of the said average weekly wage.

The opinion of Commissioner Henry D. Sayer herein is adopted as the opinion of this Commission.

In the Matter of the Claim of ANNA GRAFFE, Widow, for Compensation under the Workmen's Compensation Law, for the Death of FELIX GRAFFE, against ART COLOR PRINTING CO., Employer; ÆTNA LIFE INSURANCE COMPANY, Insurance Carrier

Death Case No. 51839

(Decided March 14, 1918)

Injuries sustained by Felix Graffe, resulting in his death, while employed by the Art Color Printing Company in New York city.

The only question at issue is as to whether the decedent's death was caused by an industrial accident. An award has already been made to claimant and the case now comes before the Commission for adjudication as to the cause of death, this proceeding being brought at the instance of the Commission's own counsel. The decedent was found dead with a fractured skull. *Held*, that under the facts shown, the award cannot be sustained.

Also, *held*, that there must be competent proof of an industrial accident before the presumptions of section 21 of the Compensation Law can be applied, and there being no such proof furnished in this case, the award cannot be sustained on the record as it now stands, and that the case should be put down for a rehearing so that the proof may be supplemented or if that is not possible that the award be rescinded.

An award has been made in this case to the widow and two minor children of Felix Graffe who died on November 20, 1917, from which an appeal has been taken, and the case now comes to the Commission at the instance of the Commission's counsel to have a determination made whether there is sufficient proof that the deceased's death was caused by an industrial accident. Mr. Graffe was working in the press-room of his employer and about ten o'clock in the evening had returned from a trip which he had taken to get his supper, and at about 10:45 o'clock he was found lying on the floor between two rolls of news print paper, each roll of which weighed from 1,000 to 1,500 pounds. He was removed to Bellevue Hospital where he died four hours later, and the record seems to show that he had a fractured skull. Nobody was present when Mr. Graffe fell and he was never able to state the cause of his fall. The only question referred by counsel is whether an industrial accident occurred.

John Graffe, for claimant.

T. Carlyle Jones, for insurance carrier.

LYON, Commissioner.—While section 21 of the Compensation Law provides that certain presumptions are applied to a compensation case, the courts have held, following the decision of the Commission, that these presumptions do not apply to the happening of an accident. It, therefore, follows that there must be competent proof of an industrial accident before the presumptions of section 21 can be applied.

The death certificate in this case gives the cause of death as "chronic endocarditis—fracture of the skull." The statement has been made in this case that unless we presume that Mr. Graffe had an industrial accident we have to deny the claim on the presumption that he fell because of vertigo or sickness, but I do not think this is the fact. If we can find no proof of an industrial accident, it seems to me that the claim must be denied not on the presumptions at all, but for failure of proof. It seems to me that the case is covered by the decision in the case of Collins v.

Brooklyn Union Gas Company. Mr. Collins was working on the street and fell to the street fracturing his skull. An award was made on the theory that it was caused by an accident, there being some claim that he stumbled over something in the street, but on review by the court it was found that there was no such proof and that the case was bare of proof as to an accident and the court held that the heart syncope from which Mr. Collins died had not been traced to an industrial accident.

It is to be noticed in this case that the two rolls of paper between which the body of Mr. Graffe was found were lying flat and there is no evidence that they fell over against him or that he was attempting to remove them before his death. I suppose it is quite true that where a man is found lying with a fractured skull in a position where the circumstances seem to show that he has fallen from a height, as, for instance, in the case of a man found dead at the bottom of an elevator shaft, the Commission has the right to draw the inference that the fall was the cause of the fractured skull, but this case is entirely barren of evidence of this kind. There seemed to be neither witnesses who can testify that anything happened to Mr. Graffe causing him to fall, nor any circumstances showing that he slipped and fell. In other words, the case seems to me to be utterly barren of proof of any accident.

In the Collins case, the Appellate Division said: "The Commission is not authorized, however, to make an award under the Act in the absence of at least some evidence that the employee met with an injury while he was at work for the specified employer and as a consequence of something that had relation to the work of the employer something done by him or by others while he was so employed."

In my opinion the award cannot be sustained on the record as it now stands and I advise that the case be put on for a rehearing on notice to all parties, for the purpose of either having the proofs supplemented, if that be possible, or the award rescinded.

On the 14th day of March, 1918, the Commission acted on the foregoing matter in accordance with the foregoing opinion.

In the Matter of the Claim of JOSEPH PALELLA for Compensation under the Workmen's Compensation Law, against LLOYD BRAZILEIRO STEAMSHIP Co., Employer; EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD., Insurance Carrier

Case No. 68089

(Decided March 18, 1918)

Injuries sustained by Joseph Palella, while employed by Lloyd Brasileiro Steamship Company, as a longshoreman in New York city.

On January 3, 1918, Joseph Palella, while employed as a longshoreman at pier No. 5, Bush Docks, in the borough of Brooklyn, city of New York, was closing a door when he was hit on the head with a hammer which a fellow employee was using in driving a bolt. Palella sustained injuries as a result, receiving a deep laceration over the left eyebrow requiring several stitches to be taken and disabling him from that time to March 18, 1918. On that date he was still disabled. The average weekly wage of Joseph Palella was the sum of twenty-five dollars and ninety-six cents. Award made.

This claim came on for hearing before the State Industrial Commission at its office, No. 230 Fifth avenue, borough of Manhattan, city of New York, on March 18, 1918. The accident out of which this claim arose occurred subsequently to the enactment by Congress of an act amending sections 24 and 256 of the Judicial Code, relating to the jurisdiction of the district courts, so as to save to claimants the rights and remedies under the Workmen's Compensation Law of any State.

Robert W. Bonynge, counsel to State Industrial Commission.

Bertrand L. Pettigrew, attorney for employer and insurance carrier.

Claimant in person.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, award and decision, as follows:

On January 3, 1918, the day when Joseph Palella received his injuries, he resided at No. 259 Fifty-eighth street, Brooklyn, New York, and was employed by Lloyd Brasileiro Steamship Company of 44 Whitehall street, New York city, engaged in the business of stevedoring. Joseph Palella was employed as a longshoreman.

On said date, Joseph Palella was working for his employer at Pier 5, Bush Docks, Brooklyn, and while engaged in the regular course of his employment as longshoreman, and while closing a door, he was hit on the left side of the head with a hammer, which was being used by a fellow employee in driving a bolt, and he sustained a laceration about one and one-half inches long and about one-half inch deep over the left eyebrow, which wound required three stitches, and which injuries disabled him from the date of said accident to March 18, 1918, and on that date he was still disabled.

The average weekly wage of Joseph Palella was the sum of twenty-five dollars and ninety-six cents.

It has not been established as a fact that the claimant failed to comply with section 18 of the Compensation Law in respect to notice of injury, and it is, therefore, presumed under section 21 that sufficient notice was given. It also appears that the employer was aware of the accident at the time of the happening thereof, and furnished medical attention immediately; and therefore, neither the employer nor insurance carrier was prejudiced by the failure, if any, to give written notice of injury within ten days after disability.

Award of compensation is hereby made against Lloyd Brasileiro Steamship Company, employer, and Employers' Liability Assurance Corporation, Ltd., insurance carrier, to Joseph Palella for the period of ten weeks and three days from January 4, 1918, to March 18, 1918, at the rate of fifteen dollars per week, and this claim is hereby continued for further hearing, and the claimant is directed to resume work if he is able to do so.

It is presumed under section 21 of the Compensation Law that sufficient notice of injury was given to the employer. The failure,

if any, of the claimant to give written notice of injury to his employer within ten days after disability is hereby excused on the ground that neither the employer nor the insurance carrier was prejudiced by such failure, if any.

In the Matter of the Claim of **MARY C. FAHEY**, Dependent Mother, and Dependent Brother and Sisters, for Compensation under the Workmen's Compensation Law, for the Death of **WILLIAM F. FAHEY**, against **CHARLES P. BOLAND & COMPANY**, Employer; **STANDARD ACCIDENT INSURANCE COMPANY**, Insurance Carrier

Case No. 26849

(Decided March 20, 1918)

Injuries sustained by William F. Fahey, resulting in his death, while employed as an iron-worker at Watervliet, N. Y., by Charles P. Boland & Co., contractor.

On June 22, 1917, William F. Fahey, while employed as an iron-worker by Charles P. Boland & Co., a contracting corporation, in the erection of a building at Watervliet, N. Y., was engaged in building a scaffold about thirty-eight feet above the ground floor. He lost his footing because of a loose plank, and fell to the ground sustaining injuries which caused his death on that day. The average weekly wage of William F. Fahey was the sum of twenty-three dollars and eight cents. The decedent left him surviving as his only dependents his mother and a brother and two sisters under the age of eighteen years. Awards made.

This claim came on for hearing before the State Industrial Commission at Albany, N. Y., on December 19, 1917, January 3, 1918, and January 30, 1918; at New York city on March 8, 1918; and at Albany on March 13, 1918, and March 20, 1918.

Robert W. Bonyngue, counsel to State Industrial Commission.

Neile F. Towner, attorney for employer and insurance carrier.

John F. O'Brien, attorney for claimants.

By the Commission.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact and award, as follows:

On June 22, 1917, the day on which William F. Fahey received the injuries which resulted in his death, he resided at Albany, N. Y., and was employed by Chas. P. Boland & Co. engaged in the construction of a building at Watervliet, N. Y. William F. Fahey was employed in connection with the construction of said building as an iron worker.

On said date, William F. Fahey was working for his employer, and while engaged in the regular course of his employment in connection with the construction of said building, and while building a scaffold about thirty-eight feet above the ground floor, lost his footing by reason of a plank becoming loose, and fell to the ground sustaining severe internal injuries, which caused his death on the same day.

The average weekly wage of William F. Fahey was the sum of twenty-three dollars and eight cents.

It does not appear whether written notice of death was given to the employer within thirty days thereafter, but it has not been established as a fact that such notice was not given, and it is, therefore, presumed under section 21 that sufficient notice was given.

William F. Fahey left him surviving no wife or child under the age of eighteen years, but left surviving Mary C. Fahey, aged forty-three years, mother, dependent upon him at the time of said accident, and also one brother and two sisters under the age of eighteen years, and all dependent upon him at the time of said accident. The names and ages of the dependent brother and sisters are as follows: James Fahey, aged six years; Marie Fahey, aged thirteen years; and Helen Fahey, aged sixteen years, the claimants herein.

Award of compensation is hereby made against Chas. P. Boland & Company, employer, and the Standard Accident Insurance Company, insurance carrier, to the dependent mother, and dependent brother and sisters of William F. Fahey, deceased employee, as

follows: To Mary C. Fahey, dependent mother, aged forty-three years, at the rate of five dollars and forty-nine cents weekly during dependency; to James Fahey, dependent brother, aged six years, and to Marie Fahey, dependent sister, aged thirteen years, and to Helen Fahey, dependent sister, aged sixteen years, at the rate of three dollars and thirty cents weekly to each until they shall respectively arrive at the age of eighteen years; and, if the payments to the dependent mother or to any of the said brother and sisters shall cease by operation of law or otherwise, then the payments to the survivors as such contingency may happen shall be proportionately increased and in the same ratio as this award; but in no event shall the payment to said mother exceed 25 per cent of said average weekly wage; and in no event shall the payment to any sister or brother exceed 15 per cent of said average weekly wage; likewise, in no event shall the total payments under said award be greater than 66 $\frac{2}{3}$ per cent of the said average weekly wage; and to James P. Murray in the sum of one hundred dollars on account of the funeral expenses of William F. Fahey, deceased.

In the Matter of the Claim of WILLIAM C. VINCENT, for Compensation under the Workmen's Compensation Law, against TAYLOR BROTHERS, Employer; LONDON GUARANTEE AND ACCIDENT COMPANY, LIMITED, Insurance Carrier

File No. 16862

(Decided March 21, 1918)

Injuries sustained by William C. Vincent, while employed by Taylor Bros., a partnership engaged in the milling business and in threshing grain for farmers.

On September 14, 1916, William C. Vincent, while employed by Frank Taylor and Horace Taylor, constituting the copartnership of Taylor Bros. of New Scotland, N. Y., in business as millers, was operating, at a farm of a customer, a threshing machine and feeding

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grain into the machine on a platform in front of said machine. He caught his right arm in the thresher with the result that it was so badly crushed as to necessitate its amputation between the wrist and the elbow. The employing firm was engaged in the threshing of grain at different farms for the purpose of promoting the general milling business in which they were engaged. The average weekly wage of William C. Vincent was the sum of twelve dollars and eighteen cents. Award made.

This claim came on for hearing before the State Industrial Commission at its office at Albany, N. Y., on December 20, 1916, May 9, 1917, July 27, 1917, and August 7, 1917, on which latter date an award was made. Upon appeal from said award the Appellate Division, third department, remitted this case to the Commission by order dated November 13, 1917. On February 8, 1918, the order of the Appellate Division was made the order of this Commission and thereafter this case came on for hearing at Albany, N. Y., on February 8, 1918, and thereafter at New York on March 21, 1918, on which latter date an award was made.

Robert W. Bonynge, counsel to State Industrial Commission.

William Butler, attorney for employer and insurance carrier.

Visscher, Whalen & Austin (J. Harris Loucks, of counsel), attorneys for claimant.

By THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its amended conclusions of fact, award and decision as follows:

On September 14, 1916, the day when William C. Vincent received his injuries, he resided at Slingerlands, R. F. D., N. Y., and was employed by Taylor Brothers, a partnership, composed of Frank Taylor and Horace Taylor of New Scotland, N. Y., engaged in the business of milling, and in connection therewith, and incidental to the acquiring of customers for said business, and

in the promotion of said business, engaged in threshing grain for various farmers in the town of New Scotland, covering a territory of about seven miles. The threshing of grain was conducted by said firm at various farms in said town. Said firm was the owner of a Westinghouse combined rye thresher and cleaner, which was taken from farm to farm. William C. Vincent was employed at the time of said accident in the operation of said threshing machine and his duties consisted in feeding grain into the machine. He was employed for general work and had been working for Taylor Brothers for twenty days prior to said accident, and for one day during that period he was employed in the mill. It was customary for Taylor Brothers on such days as they did not thresh to go back to the mill to work.

The work of threshing in which William C. Vincent was employed at the time of said accident was work fairly incidental to the prosecution of and appropriate in carrying forward and promoting the business of milling conducted by Taylor Brothers.

On said date William C. Vincent was working for his employer in the regular course of his employment at a farm known as Hilton's farm in the town of New Scotland, N. Y., where his employer was threshing grain for said Hilton. While thus employed, and while standing on a platform in front of said thresher, and while engaged in feeding grain into the machine, William C. Vincent's right hand and arm were caught in said machine, crushing the same, necessitating the amputation of the right arm between the wrist and the elbow, considered as the equivalent of the loss of the right hand.

At the time of said accident said threshing machine was located in the barn at the Hilton farm, having been drawn into the barn by horses the day before. The machine as operated was connected by a belt with a ten-horse power engine, which engine was run by kerosene and was located in the barnyard.

Joseph Hilton was one of the regular customers of Taylor Brothers' mill. Taylor Brothers purchased the threshing outfit pursuant to the request of Joseph Hilton and various farmers and, primarily, for the purpose of promoting the milling business and

in order to obtain the work of milling a portion of the grain threshed for such farmers. No regular contract was entered into for the threshing of the grain on Hilton's farm, but Joseph Hilton testified that he asked Taylor Brothers to come and thresh his grain and mill some of it. It was also the understanding of Taylor Brothers that some of the grain threshed for Joseph Hilton would be taken to the mill by Hilton to be ground. A standard price for threshing was charged and likewise a standard price for milling. In addition to the threshing price per bushel, board and lodging for the men engaged in threshing were furnished by Joseph Hilton.

The average weekly wage of William C. Vincent was the sum of twelve dollars and eighteen cents; he was paid two dollars per day, in addition to which he received his board and lodging. The value of the board and lodging was shown to be seven dollars per week. It was customary in the vicinity where this work was being carried on that all threshing contracts include a certain price per bushel for threshing and, in addition thereto, board and lodging for the men engaged in the threshing.

Written notice of injury was not given to his employer within ten days after disability, but the employer was aware of the accident and was notified verbally immediately after the happening thereof and was requested to and did furnish medical attention. Therefore neither the employer nor the insurance carrier was prejudiced by such failure.

Award of compensation is hereby made against Taylor Brothers, employer, and London Guarantee and Accident Company, Limited, insurance carrier, to William C. Vincent, injured employee, at the rate of twelve dollars and eighteen cents per week for a period of 244 weeks for the equivalent loss of the right hand.

The failure of William C. Vincent to give written notice of injury to his employer within ten days after disability is hereby excused on the ground that neither the employer nor the insurance carrier was prejudiced by such failure.

In the Matter of the Claim of JOHN M. O'ESAU, for Compensation under the Workmen's Compensation Law, against E. W. BLISS COMPANY, Employer; ÆTNA LIFE INSURANCE COMPANY, Insurance Carrier

File No. 35053

(Decided March 22, 1918)

Injuries sustained by John M. O'Esau, while employed by the E. W. Bliss Company, resulting in blood poisoning in his right hand and his right foot and necessitating three successive operations.

At the March, 1918, term of the Appellate Division, Supreme Court, Third Department, the court remitted to this Commission the claim herein for the purpose of making such findings as the Commission might see fit in reference to the filing of a claim within a year after the accident. The Commission under order of the Appellate Division finds that a letter sent to the Commission signed by the claimant was a filing of the claim within the year after said accident and also makes its amended conclusions of facts, ruling of law and award as ordered by the Appellate Division. It appears that the original claimant herein died on March 21, 1918. *Held*, that the employer and the insurance carrier are alike estopped to plead the Statute of Limitations in respect to the alleged failure of the claimant to file his claim within one year after the injury.

The opinion of the Commissioner, Edward P. Lyon, is adopted as the opinion of this Commission only in so far as it is not inconsistent with these amended findings.

This claim was remitted to this Commission by the Appellate Division, Supreme Court, third department, at the March, 1918, term, for the purpose of making such findings as the Commission might see fit in reference to the filing of a claim within a year after the accident. On March 18, 1918, the order of the Appellate Division was adopted as the order of the Commission and a hearing held on March 22, 1918, at which time it developed that John M. O'Esau, the claimant herein, died on March 21, 1918.

Robert W. Bonyng, counsel to State Industrial Commission.

James B. Henney, attorney for employer and insurance carrier.

Martha A. O'Esau, widow of claimant.

By THE COMMISSION.—It appearing that the Attorney-General, having contended upon argument of this appeal before the Appellate Division that a letter to the Commission signed by the claimant was a filing of the claim within the year after said accident, this Commission pursuant to the order of the Appellate Division remitting this case makes its amended conclusions of fact, ruling of law and award as follows:

This Commission readopts and reaffirms all of the "conclusions of fact" contained in the original findings of this Commission dated November 15, 1917, except the 3d and 4th paragraphs thereof, which are hereby amended to read as follows:

3. John M. O'Eau filed with this Commission a formal claim for compensation on June 6, 1917, which was more than one year after the date of the actual injury received, but less than one year from the date of actual disability; however, within one year after the date of said accident, and on October 24, 1916, the State Industrial Commission received and filed a letter signed by the claimant herein, in which he states as follows:

"I would like to know if I am entitled to any compensation. I have been working for the E. W. Bliss Co. ammunition works for the past year. Six months ago I received an injury which afterwards turned into blood poisoning in my right hand and then passed into my right foot. I was operated on three times and am just recovering from it.

"I lost about one month's time by taking a few days off each week from the pain. I receive \$14.40 for a full week and as I have a wife and child to support it is going to be hard to pay a doctor's bill."

4. The conduct of the employer, in view of all the circumstances, and particularly in keeping the claimant employed up to April 30, 1917, for a period of more than a year after the date of said accident, at a rate of wages equal to the wages earned prior to said accident, and in furnishing medical attention for the period required by the Compensation Law, directly induced the claimant to delay in filing a formal claim for compensation until after the expiration of the statutory period, as set forth in section 28 of the Compensation Law.

This Commission readopts and reaffirms all of the "ruling of law" and "award" contained in the original findings dated November 15, 1917.

This Commission amends its "decision" contained in the original findings dated November 15, 1917, which decision, as amended, is to read as follows:

The failure, if any, of John M. O'Esau to give written notice of injury to his employer within ten days after disability is hereby excused on the ground that neither the employer nor insurance carrier was prejudiced by such failure, if any.

The letter written by the claimant, John M. O'Esau, to this Commission dated October 22, 1916, and which letter was received and filed October 26, 1916, constitutes a claim for compensation.

The employer and insurance carrier are alike estopped to plead the Statute of Limitations in respect to the alleged failure of the claimant to file his claim within one year after the injury, since by the conduct of the employer, whether fraudulent or not, it has directly induced the plaintiff to delay in filing a formal claim for compensation with the Commission until after the expiration of one year from the date of said accident.

The opinion of Commissioner Edward P. Lyon herein is adopted as the opinion of this Commission only in so far as it is not inconsistent with these amended findings.

In the Matter of the Claim of JULIA FOSTER, Widow, for Compensation under the Workmen's Compensation Law, for the Death of JAMES E. FOSTER, against WILSON & ENGLISH CONSTRUCTION COMPANY, Employer; EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD., Insurance Carrier

Case No. 11241

(Decided March 25, 1918)

Injuries sustained by James E. Foster, resulting in his death, while employed by the Wilson & English Construction Company, as a locomotive engineer, at Winfield, L. I.

On August 26, 1916, James E. Foster, while employed by the Wilson & English Construction Company, general contractors of New York

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city, who were also operating a steam railway at Winfield, L. I., was riding on the rear running board of an engine which was pushing a handcar loaded with lumber. The car jumped the track, jamping the timber against Foster's left leg, requiring an amputation above the knee. Gangrene set in and Foster died as a result on August 30, 1916. The average weekly wage of James E. Foster was the sum of twenty-three dollars and eight cents. Award made.

This claim came on for hearing before State Industrial Commission at its office, No. 230 Fifth avenue, borough of Manhattan, city of New York, on October 11, 1916, and October 18, 1916, on which latter date an award of compensation was duly made to Julia Foster, widow, at the rate of six dollars and ninety-three cents weekly, during widowhood, with two years' compensation in one sum upon remarriage, together with an award of one hundred dollars on account of the funeral expenses of James E. Foster, deceased. On October 25, 1916, a copy of the decision and award was duly mailed to all parties pursuant to sections 20 and 23 of the Compensation Law. No appeal from said award has ever been taken, but the employer and insurance carrier have acquiesced in said award and made payments thereunder.

On August 5, 1917, application of the claimant to have the award commuted into one lump sum came on for hearing, at which time said application was denied; thereafter, and on January 23, 1918, and February 6, 1918, the application of the claimant for commutation of the award was duly considered and on the latter date the award was commuted into one lump sum as of February 6, 1918. On March 25, 1918, the action of February 6, 1918, in commuting said award was confirmed.

Robert W. Bonynge, counsel to State Industrial Commission.

Bertrand L. Pettigrew, attorney for employer and insurance carrier.

Jeremiah F. Connor, attorney for claimant.

By THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered the Commission makes its conclusions of fact, award and decision, as follows:

On August 26, 1916, the day when James E. Foster received his injuries which resulted in his death on August 30, 1916, he resided in New York city and was employed by Wilson & English Construction Company of 50 Church street, New York city, engaged in business as general contractors, and in the operation of a railway operated by steam power at Winfield, L. I. James E. Foster was employed as a locomotive engineer.

On August 26, 1916, James E. Foster was working for his employer at Winfield, L. I., and while engaged in the regular course of his employment as a locomotive engineer, while riding on the rear running-board of an engine which was pushing a handcar loaded with timber the car jumped the track jamming the timber against his left leg, and he sustained a crushing injury to the left leg, including a compound fracture thereof which necessitated the amputation of the leg above the knee and resulted in gangrene and in the absorption of toxins due to the gangrene which caused his death on August 30, 1916.

The average weekly wage of James E. Foster was the sum of twenty-three dollars and eight cents.

Due notice of death was given to the employer.

James E. Foster left him surviving Julia Foster, widow, aged forty-six years.

Award of compensation heretofore made against Wilson & English Construction Company, employer, and Employers' Liability Assurance Corporation, Ltd., insurance carrier, at the rate of six dollars and ninety-three cents weekly to Julia Foster, widow, aged forty-six years, during widowhood, with two years' compensation in one sum upon remarriage, is hereby commuted to one lump sum payment; that the unpaid instalments of said award be paid to claimant in one lump sum as computed by the actuary of this Commission, which computation shows the present value of the unpaid instalments to be \$5,628.23, as of February 6, 1918, assuming that compensation has been duly paid to February 5, 1918.

The commutation of the periodical payments of said award to one lump sum payment has been deemed advisable for the reason that such commutation is in the interest of justice.

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In the Matter of the Claim of **WALTER BENNETT COLON**, for Compensation under the Workmen's Compensation Law, against **AMERICAN LINOLEUM MANUFACTURING COMPANY**, Employer; **LONDON GUARANTEE AND ACCIDENT COMPANY**, Insurance Carrier

Case No. 47929

(Decided April 1, 1918)

Injuries sustained by **Walter Bennett Colon**, while employed by **American Linoleum Manufacturing Company** at **Linoleumville, N. Y.**

On July 14, 1917, **Walter Bennett Colon**, who was employed by **American Linoleum Manufacturing Company**, engaged in the manufacture of linoleum and oilcloth at **Linoleumville, N. Y.**, was walking along a dark passageway in the regular course of his employment of checking cases, when he stumbled over a truck, striking his left knee, which resulted in an infection of the left knee joint, disabling him from July 18, 1917, to March 20, 1918. On that date he was still disabled. The average weekly wage of **Walter Bennett Colon** was the sum of thirteen dollars and eighty-five cents. Award made.

This claim came on for hearing before the State Industrial Commission at its office, No. 230 Fifth avenue, New York city, on January 11, 1918, January 25, 1918, and February 1, 1918, at which latter date an award of compensation was duly made. This claim came on for a hearing on the application of the insurance carrier for a rehearing on March 18, 1918, and on April 1, 1918, on the application of the claimant to have the award commuted into one lump sum.

Robert W. Bonynge, counsel to State Industrial Commission.

William Butler, attorney for employer and insurance carrier.

By THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact and award, as follows:

On July 14, 1917, the day when **Walter Bennett Colon** received his injuries, he resided at No. 212 West One Hundred and Ninth

street, New York city, and was employed by American Linoleum Manufacturing Company, engaged in the manufacture of linoleum and oilcloth, with a plant or place of business located at Linoleumville, N. Y. Walter Bennett Colon was employed at said plant and his duties consisted in checking cases.

On said date Walter Bennett Colon was working for his employer at his employer's plant; while engaged in the regular course of his employment, while walking along a dark passageway, he stumbled over a truck, striking his left knee, which resulted in an infection of the left knee joint, and which injuries disabled him from July 18, 1917, to March 20, 1918, and on that date he was still disabled.

The average weekly wage of Walter Bennett Colon was the sum of thirteen dollars and eighty-five cents.

Due notice of injury was given to the employer.

The employer, either through refusal or neglect, failed to make a report of said accident in writing to this Commission as required by section 111 of the Compensation Law.

Award of compensation is hereby made against American Linoleum Manufacturing Company, employer, and London Guarantee and Accident Company, insurance carrier, to Walter Bennett Colon, injured employee, at the rate of nine dollars and twenty-three cents per week from July 18, 1917, to March 20, 1918, and this claim is hereby continued for further hearing.

In the Matter of the Claim of RUDOLPH DEECKE, for Compensation under the Workmen's Compensation Law, against HUYLER'S CORPORATION, Employer; ZURICH GENERAL ACCIDENT AND LIABILITY INSURANCE COMPANY, Insurance Carrier

File No. 45462

(Decided April 2, 1918)

Injuries sustained by Rudolph Deecke, while employed as a candymaker by Huyler's Corporation in New York city.

On August 14, 1915, Rudolph Deecke, while employed as a candymaker by Huyler's Corporation in New York city, and while moving sugar barrels,

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sustained a hernia. After said accident he continued at work for more than a year, when his condition became worse and he was persuaded by his employer and the insurance carrier to have an operation, although his own physician advised against it. From the time of the operation his mental condition began to grow worse until he became almost imbecile. As a result of the injury sustained on August 14, 1915, Rudolph Deecke was disabled from October 14, 1916, to September 21, 1917, and on that date he was still disabled. Thereafter, and on some date prior to December 14, 1917, claimant died. The average weekly wage of Rudolph Deecke was the sum of sixteen dollars and thirty-two cents. Award made, payable to the estate of Rudolph Deecke, deceased, said award to be paid to the administratrix of his estate.

Rudolph Deecke was injured on August 15, 1915, at which time he sustained a hernia. He continued at work until October 14, 1916. In October, 1916, the employer and insurance carrier persuaded him to have an operation, although his family physician advised against it. By written agreement, dated January 4, 1917, signed by the employer and injured employee, payment of compensation was provided for the period from October 28, 1916, to December 23, 1916, for a period of eight weeks at the rate of ten dollars and eighty-eight cents weekly, based on the agreed average weekly wages of sixteen dollars and thirty-two cents. Six weeks' compensation was paid to claimant in January or February, 1917, as appears from the testimony of the representative of the insurance carrier on June 14, 1917. Under date of January 10, 1917, the insurance carrier, by letter addressed to this Commission, requested that the case be put on for a hearing, stating that they felt disposed to close the compensation payments, but before doing so would like to hear from this Commission. On January 18, 1917, the original report of agreement as to payment of compensation hereinbefore referred to was duly filed with this Commission and thereafter hearings were duly held herein on May 4, 1917, May 11, 1917, May 25, 1917, June 7, 1917, June 14, 1917, July 3, 1917, August 10, 1917, and September 21, 1917, on which latter date an award of compensation was made to that date and notice of said award was duly mailed to all parties on September 27, 1917. On the request of the insurance carrier this case came on for rehearing on October 22, 1917, and December 14, 1917, on which date a

letter was received stating that claimant had died. This case came on for further hearing on December 28, 1917, March 4, 1918, March 11, 1918, and April 2, 1918, on which date the application of the insurance carrier to vacate the award in this case was denied.

Robert W. Bonyngne, counsel to State Industrial Commission.

Alfred W. Andrews (Jeremiah F. Connor, of counsel), attorney for employer and insurance carrier.

Otto Henschel, attorney for claimant and for administratrix of Rudolph Deecke, deceased.

By THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, award and decision, as follows:

On August 14, 1915, the day when Rudolph Deecke received his injuries, he resided at No. 1315 Chisolm street, New York city, and was employed by Huyler's Corporation, engaged in the manufacture of confectionery, with a plant or place of business at No. 64 Irving place, New York city. Rudolph Deecke was employed as a candymaker.

On August 14, 1915, while working for his employer at No. 64 Irving place, New York city, and while engaged in the regular course of his employment, while moving sugar barrels. Rudolph Deecke sustained a hernia. After said accident he continued at work until more than a year, or until October 14, 1916; all of which facts set forth herein are evidenced by and contained in the original report of agreement as to payment of compensation duly signed and acknowledged by the employer and injured employee on January 4, 1917, and filed with this Commission on January 18, 1917, and which agreed facts are therein stated to be the basis of a claim made by Rudolph Deecke. On October 14, 1916, his hernia was found to be in a bad condition and, although his own physician advised against an operation, the employer and insurance carrier persuaded him to have

an operation in October, 1916. The operation caused a presenile mental deterioration. From the time of the operation his mental condition began to grow worse until he became almost imbecile. As a result of said injuries sustained on August 14, 1915, Rudolph Deecke was disabled from October 14, 1916, to September 21, 1917, and on that date he was still disabled.

The average weekly wage of Rudolph Deecke was the sum of sixteen dollars and thirty-two cents.

No written claim for compensation under the Workmen's Compensation Law was filed with this Commission within one year after the injury of August 14, 1915, but both employer and insurance carrier are estopped to raise the plea of the Statute of Limitations by reason of the above facts, and the facts set forth in the opinion of Commissioner Edward P. Lyon, which are adopted with the same force and effect as if herein set forth in full. Likewise, and for the same reason, both the employer and insurance carrier are estopped from raising any question in respect to the failure, if any, to give written notice of injury within ten days after disability.

Award of compensation is hereby made against Huyler's Corporation, employer, and Zurich General Accident and Liability Insurance Company, insurance carrier, to Rudolph Deecke, injured employee, at the rate of ten dollars and eighty-eight cents per week from October 28, 1916, to September 21, 1917, and this claim is hereby continued for further hearing. Said award is payable to the estate of Rudolph Deecke, deceased, and is to be paid to the administratrix of his estate.

Both the employer and insurance carrier are estopped to plead the Statute of Limitations in respect to the failure of the claimant to file his claim within one year after the injury by reason of their own acts, as set forth in conclusions of fact herein; likewise, the employer and insurance carrier are estopped to raise any question in respect to the failure of the claimant to give written notice of injury to the employer within ten days after disability.

The opinion of Commissioner Edward P. Lyon is adopted as the opinion of this Commission.

